

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1933

No. 5973

387

SPECIAL CALENDAR.

WILLIAM E. BEDELL, APPELLANT,

vs.

UNITED STATES.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED JUNE 5, 1933.

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Court of Appeals of the District of Columbia

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INDEX.

	Original	Print
Caption	<i>a</i>	1
Indictment	1	1
Endorsement	2	2
Memorandum: Arraigned; plea, not guilty.....	2	3
Verdict as to Bedell, guilty, as indicted.....	3	3
Motion for a new trial.....	3	3
Memorandum: Motion for new trial overruled; exception noted	4	4
Sentence, appeal noted by Bedell, and bond for costs fixed..	5	4
Memoranda: Cost bond, \$100, filed; order extending time for filing bill of exceptions; bill of exceptions filed.....	5	5
Assignment of errors.....	5	5
Order making bill of exceptions part of record.....	7	6
Designation of record.....	7	6
Clerk's certificate.....	8	7
Amended bill of exceptions.....	9	7

	Original	Print
Testimony of Richard M. Warrilow.....	10	9
James H. Cowan.....	11	9
Raymond Davis.....	11	9
James Elam Grove.....	11	9
Herbert Lee.....	32	26
Mrs. Lottie L. Boone.....	35	28
Raymond Bunn.....	36	29
Joseph F. Bowers.....	36	29
Carlton Talley.....	38	30
James F. Grove, Sr.....	39	31
Mr. William H. Collins.....	40	32
August Pagliocchini.....	46	37
James Elam Grove.....	55	44
William Estes Bedell.....	55	45
Carlton Talley.....	60	48
Officer Walter S. Beck.....	60	49
Court's charge to jury.....	61	50

Court of Appeals of the District of Columbia

WILLIAM E. BEDELL, Appellant,

vs.

UNITED STATES.

a Supreme Court of the District of Columbia.

Criminal. No. 52334.

UNITED STATES

vs.

JAMES E. GROVE, WILLIAM E. BEDELL et al.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Indictment.

Filed in Open Court September 14, 1932.

Supreme Court of the District of Columbia, Holding a Criminal Term, July Term, A. D. 1932.

DISTRICT OF COLUMBIA, ss:

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one James E. Grove, one William F. Cush, one August Pagliocchini, and one William E. Bedell, each late

of the District of Columbia aforesaid, on, to wit, the twenty-sixth day of July, 1932, and at the District of Columbia aforesaid, the warehouse of the Breyer Ice Cream Company, a body corporate, here situate, feloniously did enter, with intent therein to commit the crime of larceny, to wit, with intent the goods, chattels, and property in the said warehouse, then and there being, feloniously to steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That the said James E. Grove, the said William F. Cush, the said August Pagliocchini, and the said William E. Bedell, on, to wit, the said twenty-sixth day of July, 1932, and at the District of Columbia aforesaid, three hundred and ninety-five stamps, each stamp of the value of one cent; five hundred certain other stamps, each stamp of the value of two cents; nine hundred and seventy-nine dollars and thirty-nine cents in money, of the value of nine hundred and seventy-nine dollars and thirty-nine cents, of the goods, chattels, money and property of the said Breyer Ice Cream Company, a body corporate as aforesaid, then and there being found, feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

JOHN W. FIHELLY,

*Assistant Attorney of the United
States in and for the District
of Columbia.*

(Endorsed:) Criminal. No. 52334. United States vs. James E. Grove, William F. Cush, August Pagliocchini, and William E. Bedell. Housebreaking and larceny. Witnesses: Raymond Davis, Herbert Lee, Joseph F. Bowers, M. P. A true bill. Charles C. Crampton, Foreman.

Memorandum.

September 21, 1932.—Arraigned; plea, not guilty.

3 Supreme Court of the District of Columbia.

Wednesday, November 30", A. D. 1932.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice Wheat presiding.

* * * * *

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited in this case yesterday; and thereupon the defendant Pagliocchini withdraws his plea of not guilty heretofore entered, pleads guilty to the indictment, submits to the mercy of the Court and is remanded to the Washington Asylum and Jail; whereupon the said jury upon their oath say that the defendant Bedell is guilty in manner and form as charged in the indictment and the defendant Cush by direction of the Court is not guilty; whereupon it is considered by the Court that the said defendant Cush go thereof without day and the defendant Bedell is remanded to the Washington Asylum and Jail.

Motion for New Trial.

Filed December 5, 1932.

* * * * *

Now comes the defendant, William E. Bedell, by his attorney, Harry T. Whelan, and moves the Court for a new trial in the above entitled cause, and for reasons therefor shows to the Court as follows:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to the weight of the evidence.
3. That the Court erred in instructing the jury.
4. That the Court erred in admitting evidence contrary to law.
5. For other and just reasons which will appear upon the hearing of this motion.

4

HARRY T. WHELAN,
Attorney for William E. Bedell.

To Leo A. Rover, Esquire:

Please take notice that the above motion will be called to the attention of the Court on the — day of December, A. D. 1932, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

HARRY T. WHELAN.

Service of copy acknowledged December —, 1932.

JOHN J. SIRICA,
Ass't U. S. Attorney.

Memorandum.

January 27, 1933.—Motion for New Trial overruled; exception noted.

Supreme Court of the District of Columbia.

Saturday, January 28", A. D. 1933.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice Wheat presiding.

* * * * *

Come as well the Attorney of the United States, as the defendants in proper person, each in custody of the Superintendent of the Washington Asylum and Jail, the defendant Pagliocchini by his attorney George Rose, Esquire, and the defendant Bedell by his attorneys Messrs. Whelan and O'Connell; and thereupon it is demanded of each defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the Court that for his said offense each of the said defendants be taken by the Superintendent aforesaid to the

5 Asylum and Jail, whence he came, thence to the Penitentiary, as designated by the Attorney General of the United States, the defendant Grove there to be imprisoned for the period of One (1) year to Two (2) years, to take effect from and including this date and to run concurrently with case No. 52332, the defendant Pagliocchini there to be imprisoned for the period of Two (2) years and Six (6) months to Four (4) years on each count to run concurrently and to take effect from and including this date and to run

concurrently with the sentence in Juvenile Court, and the defendant Bedell there to be imprisoned for the period of Three (3) years to Five (5) years on each count to run concurrently, to take effect from and including the date of arrival of said defendant at said Penitentiary; whereupon the defendant Bedell by his attorneys notes an appeal to the Court of Appeals of the District of Columbia, from the judgment of the Court in this case; whereupon the Court fixes the amount of bond for costs on appeal at One Hundred Dollars or Fifty Dollars in cash.

Memoranda.

February 17, 1933.—Cost Bond \$100 filed.

Order extending time for filing Bill of Exceptions to March 1, 1933.

February 28, 1933.—Bill of Exceptions filed.

Assignment of Errors.

Filed April 28, 1933.

* * * * *

Now comes the defendant, William E. Bedell, and assigns as errors committed by the trial court herein, the following:

6 1. The Court erred in permitting attorney for the United States to cross examine the witness, James E. Grove, a witness produced on behalf of the Government, on the theory that the Government was taken by surprise.

2. The Court erred in refusing to permit counsel for the defendant to produce testimony to establish the fact that the attorney for the United States was not taken by surprise.

3. The Court erred in permitting counsel for the Government to cross examine the witness Grove regarding a statement alleged to have been made by him to the Police Department out of the presence of the defendant, Bedell, and in permitting the United States Attorney to read in the presence of the jury parts of the statement.

4. The Court erred in permitting the United States Attorney to cross examine the defendant Bedell on collateral issues not contained in the direct examination.

5. The Court erred in refusing to direct a verdict of not guilty on behalf of the defendant Bedell.

6. The Court erred in refusing to grant the defendant's motion for a new trial.

7. The Court erred in its instructions to the jury in telling the jury that a witness "simply laid down on him."

WHELAN & O'CONNELL,
By HARRY T. WHELAN,
Attorneys for Defendant Bedell.

Service of copy acknowledged April 28, 1933.

UNITED STATES ATTORNEY,
By WALTER M. SHEA,
His Assistant.

7 Supreme Court of the District of Columbia.

Friday, April 28", A. D. 1933.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice Wheat presiding.

* * * * *

Now comes here the defendant by his attorney Harry T. Whelan, Esquire, and prays the Court to sign, and make a part of the record his Bill of Exceptions taken during the trial of the case and filed with the Court on the 28th day of February, A. D. 1933, which is accordingly done.

Designation of Record.

Filed April 28, 1933.

* * * * *

The Clerk will please prepare as transcript of record of the appeal the following papers:

1. The indictment.
2. Memo.—Plea of not guilty.
3. Bill of Exceptions.
4. Motion for New Trial.
5. Memo.—Order overruling Motion for New Trial.
6. Judgment of Court.

7. Memo.—Appeal bond fixed at \$100.00.
8. Assignment of Errors.
9. This Designation.

WHELAN & O'CONNELL,
By HARRY T. WHELAN,
Attorneys for Defendant Bedell.

Service of copy acknowledged April 28, 1933.

UNITED STATES ATTORNEY,
By WALTER M. SHEA,
His Assistant.

8 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 7, both inclusive, to be a true and correct transcript of the record, according to directions of counsel, herein filed, copy of which is made part of this transcript, in the case of the United States vs. James E. Grove, et al., Criminal No. 52334, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of May, 1933.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

9 In the Supreme Court of the District of Columbia,
Holding a Criminal Term.

Number 52334.

UNITED STATES OF AMERICA
vs.

WILLIAM E. BEDELL.

Amended Bill of Exceptions Filed by William E. Bedell.

Be it remembered that at the trial of this case before Mr. Chief Justice Alfred A. Wheat, and a jury, duly em-

panelled and sworn to try the issues herein, this trial began on November 29, 1932, and thereafter was further proceeded with. To maintain the issues on its part joined, the United States produced the following evidence and the following proceedings were had:

The first count charged that the defendant, William E. Bedell, together with one James E. Grove, one William F. Cush, and one August Pagliocchini, on to-wit the 26th day of July, 1932, and at the District of Columbia aforesaid, the warehouse of the Breyer Ice Cream Company, a body corporate, there situate, feloniously did enter, with intent therein to commit the crime of larceny, to-wit with intent the goods, chattels, and property in said warehouse, then and there being, feloniously to steal, take, and carry away; the second count charged that this defendant, William E. Bedell, together with one James E. Grove, one William F. Cush, and one August Pagliocchini, on to-wit the 26th day of July, 1932, and at the District of Columbia aforesaid, three hundred and ninety-five stamps, each stamp of the value of one cent; five hundred certain other stamps, each stamp
10 of the value of two cents; nine hundred and seventy-nine dollars and thirty-nine cents in money, of the value of nine hundred and seventy-nine dollars and thirty-nine cents, of the goods, chattels, money and property of the said Breyer Ice Cream Company, a body corporate as aforesaid, then and there being found, feloniously did steal, take, and carry away; all against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

That on the 21st day of September, 1932, this defendant was arraigned and entered a plea of not guilty to the indictment herein.

That on the 29th day of November, 1932, this defendant was tried and on the 30th day of November, 1932, this defendant was found guilty by the jury on both counts of the indictment herein.

That on the 5th day of December, 1932, a motion for a new trial was filed, and on the 13th day of January, 1933, the motion for a new trial was argued and was overruled on the 27th day of January, 1933.

That on the 28th day of January, 1933, this defendant was sentenced to serve a term of from three to five years on each count of the indictment herein, the sentence- to run concurrently.

Richard M. Warrilow was called as a witness on behalf of the Government and testified as follows:

That he was the Secretary of the Breyer Ice Cream Company, a corporation, incorporated in Delaware on June 8, 1926, whose place of business was located at 1830 East Bladensburg Road, Northeast, in the City of Washington, District of Columbia.

11 **James H. Cowan** was called as a witness on behalf of the Government and testified as follows:

That he was employed at the Breyer Ice Cream Company at night, taking night calls; that he was so employed on the 25th day of July, 1932, but left the premises between 11:25 and 11:30 p. m. as was his usual custom, after having locked the place; that at about 5 o'clock he put some money in the safe in the place where the day's cash receipts were kept.

Raymond Davis was called as a witness on behalf of the Government and testified as follows:

That he was the manager of the Breyer Ice Cream Company Plant and was so employed in July of 1932; that on the mornnig of July 26th, he was called to the premises and on arrival found there that the safe had been broken into, the money stolen, and the papers and records scattered on the floor; that upon checking the records he was able to tell that the amount that had been taken was something over \$900; that the police had been called in by someone prior to his arrival at the place. That the money was the property of the Breyer Ice Cream Company.

James Elam Grove was called as a witness on behalf of the Government and testified as follows:

That he had been a defendant in this case but had previously entered a plea of guilty to this charge, as well also as a plea of guilty to two other charges of housebreaking and larceny. He testified that he knew the three defendants, William F. Cush, August Pagliocchini and William E. Bedell, and thereupon identified each one. That he knew
12 Cush by the name of 'Doc'; that he knew Bedell by the name of 'Bee'; that he knew Pagliocchini by the name of 'Mussolini'. Thereupon, he was asked

whether or not he saw the defendants on Monday night, July 25th, 1932, to which he replied "No"; that he did not see them anywhere that night, and did not go anywhere with them that night. Whereupon, Mr. Sirica, Assistant United States Attorney for the Government, announced on behalf of the Government that he was taken by surprise and asked leave to cross examine this witness. Whereupon, the following occurred, out of the hearing of the jury:

"Mr. Kelly: Your Honor, I have been informed that this man on at least one occasion told Mr. Collins of the District Attorney's Office that these boys sitting over here had nothing to do with the matter. I understand that he also made a statement in which he involved them. So I do not see how the Government can now announce surprise, if the witness has previously made contradictory statements, has made this statement on at least one other occasion in the District Attorney's Office. If he makes such a statement in the District Attorney's Office and then comes here and makes the statement, I do not see how the District Attorney can say that he is taken by surprise by what the witness says here in Court.

"Mr. Sirica: Your Honor, as Mr. Kelly has said, this witness did deny on one or two occasions what he had first said to the police. Mr. Kelly was advised of that. But on November 18th, he was brought up to the grand jury room, in the presence of his father, Detective Talley, Detective Bowers, and one or two others, and we handed to
13 him the statement that he had made to the police on August 31st, asked him to read it and every line of it, and he read it through, and at that time I asked 'Grove, is that a true statement?' He said, 'Yes, it is a true statement'. And that is the statement we are relying on now as his testimony. And on his testimony just given here we announced surprise because of the attitude of the witness in not sticking to that statement.

"The Court: Gentlemen of counsel for the defendants, I do not think there is any doubt about the matter.

"Mr. Sirica: And, your Honor, I can show you two cases decided by the Court of Appeals if you want to see them.

"The Court: I think where a witness tells one story one day and another story another day, and then comes forward and confirms the first story, that counsel putting the wit-

ness on the stand may claim surprise and have the privilege of cross-examining him.

“Mr. Kelly: I don’t see how Government counsel can announce that he is taken by surprise when this witness has already denied that written statement.

“Mr. Sirica: We do announce surprise and contend that we are taken by surprise.

“Mr. Kelly: I understand that you announce it, but I contend that the only instance wherein the Government can announce surprise is where a witness has made a statement and then has repudiated it. But where a witness has heretofore made conflicting statements, has said one time one thing and another time another thing, and on a couple of occasions has said these defendants had nothing to do with it, and on other occasions has said they did, I don’t see how the Government can be taken by surprise.

14 “Mr. Sirica: We are going to the trial of the case on what he said within a week or two up at the grand jury room.

“Mr. Kelly: Yes, but this is going to the jury.

“The Court: It is all up to the jury.

“Mr. Sirica: I have the right to cross-examine on whichever statement he made.

“Mr. Kelly: We wish to note an exception, if your Honor please.

“The Court: All right. Let the exception be noted.

* * * * *

“Mr. Whelan: On this question, if your Honor please, I understand now that the District Attorney seeks to cross-examine the witness he has produced and placed on the stand.

“Mr. Sirica: Yes.

“Mr. Whelan: I want to advise the Court at this time that my information is this particular witness plead guilty, that he has attorneys, that he has told his attorneys that he has made false statements and wants to correct them, that they have worried him. If that is so, and if this witness has an attorney—and I don’t know whether that attorney has advised the United States Attorney’s Office of that fact or not—but if that attorney has advised the United States Attorney’s office, then most certainly they could not be taken by surprise and should not have the right

to cross-examine this witness. So I am going to ask your Honor this: This is a very unusual situation, that is presented here in this case. All of us, the District Attorneys, counsel for defendants, have been disturbed about this matter. I would ask that the jury be excluded now, and that your Honor get the attorney for this man here, and that your Honor yourself question this witness. He is a
15 young boy, and he has made pro and con statements about this same thing. I understand he has told the District Attorney that he did not tell the truth at the beginning, and we feel that the situation is such we should appeal to the Court for some assistance for fear there may be a miscarriage of justice one way or the other.

“Mr. Sirica: I expect to cross-examine this defendant, if permitted to do so, on the reasons why he is not testifying now according to his signed statement, and I expect to examine him on certain threats that have been made to him at different times to show why he is not now so testifying.

“The Court: I think it will have to go to the jury. I do not think you counsel for defendants are presenting a question that has not arisen before.

“Mr. Sirica: Oh, no, if your Honor please, and if it were necessary I could present some cases on the point.

“Mr. Whelan: Yes, if taken by surprise, but I do not think you are in fact taken by surprise when the boy has already heretofore denied that statement.

“Mr. Sirica: The last time I saw him he told us that the statement was true. And that is what we are now going to trial on.

“The Court: Logically it is a surprise if he goes back on what he has said.

“Mr. Kelly: But that is not the test in this situation. He has made different statements, conflicting statements, and of course in that event if one is true the other is not.

“The Court: What you are trying to do is to prevent
16 this story from coming out. Now, it is not a question to be unduly technical on. The District Attorney expected this man to testify that he was there that night, and when seated in the witness chair, and I could see him, and you could see him, how he hesitated, and swallowed hard two or three times, and finally mumbled something. Now, if that is not a case where the truth should be brought out if it can be brought out, I don't know.

“Mr. Kelly: I respectfully submit for your Honor, because your Honor has made a ruling on the question of surprise, and quite naturally we bow to your ruling, but with respect to any testimony that he might give, if it went in, we submit it would not be proof of anything. In other words, it would not be proof if Mr. Sirica asked, ‘Didn’t you make this statement?’ and should he admit it or deny it, I say that is not evidence before the jury as to that. As I understand the situation the only purpose for which your Honor is permitting the cross-examination of the witness is that Mr. Sirica has announced surprise and it is to affect his credibility as a witness. The witness has not said anything yet.

“Mr. Sirica: I am not bound by the statement he makes. That is another reason.

“Mr. Whelan: That is a technical reason. Your Honor, I should like to find out the practical truth of the matter. I should like to have your Honor excuse the jury and yourself take hold of the examination of this witness.

“The Court: It is not up to me to find out the truth in that way when counsel are examining the witness.

“Mr. Whelan: No, to find out whether counsel for the Government has been taken by surprise. Let your Honor determine that after talking to the witness, which is
17 a legal question after all.

“Mr. Sirica: I expect to cross-examine the witness on that point. I will bring that out.

“The Court: The object of a trial is to ascertain the truth. Ordinarily a witness is put on the stand by one of the parties, and he is supposed to have been examined beforehand and to have told a certain story, and examining counsel are supposed to be familiar with what he is going to put forth. In a general way he vouches for his general credibility. But it is not a hard and fast rule when a situation develops where the truth requires that counsel may cross-examine the witness. That is my experience.

* * * * *

“The Court: It is for the jury and not for me. You cannot make me believe that when a witness like this one sits there in the witness chair, and shows his emotions, and he is a poor weakling for you can see that; when he sits there and acts like he does, that the District Attorney must be

helpless, and when a verdict for the defendant has to be directed.

“Mr. Kelly: We do not request that.

“The Court: No. But what you request now is that I forbid the District Attorney to cross-examine this witness. I will not do it, gentlemen.

“Mr. Whelan: Now, I ask your Honor, and it is a judicial question, the question of surprise, and is solely for your Honor; I ask your Honor to take hold of this witness and tell him he is under the protection of this court and that you want the truth, and that your Honor will see whether or not the District Attorney is taken by surprise before you permit cross-questions to be put to the witness.

18 “The Court: Instead of asking the witness if he is taken by surprise I will take Mr. Sirica’s statement for it.

“Mr. Sirica: I announced that I was taken by surprise by the last statement that the witness made. That is all that I can possibly do in the case.

“The Court: I will permit you to cross-examine the witness, Mr. Sirica.

“Mr. Whelan: We note an exception.

“Mr. Kelly: We also note an exception.

“Mr. Rose: I also note an exception.”

Whereupon the witness was handed a paper purporting to be a statement made by him to the police at the time of his arrest and identified his signature thereto as well also as the signatures of the officers who witnessed the statement. The witness testified that the statement was made on August 31, 1932, at police headquarters after he had been advised of his rights by Detective Talley; that on November 18, 1932, he was brought to the grand jury room by a United States Marshal and that in the presence of Police Officer Talley, Assistant United States Attorney Collins and Mr. Sirica, counsel for the Government, and one or two others, he was handed a piece of paper to read and was asked if the statements contained therein were true, to which he replied that they were true. Thereupon, the following occurred:

“Q. Now, I am going to ask you a few questions on this. Starting off it says:

‘Statement of James Elam Grove relative to housebreaking at the Breyer’s Ice Cream Company, 1830 Bladensburg Road, Northeast, at or about 1 a. m., July 26, 1932.’

That statement was made originally on August 31, 1932, in the office of the robbery squad of the Detective Bureau, is that right? A. Yes, sir.

Q. Then it goes on:

‘I, James Elam Grove, after being advised as to my legal rights, that I am not compelled to make a statement in reference to the above housebreaking, and after being told that any statement that I would make, would be used against me in court, do hereby make the following statement, of my own free will, without duress or promise of any favor shown me.

‘Questioned by Detective Sergeant Carlton Talley:

‘Question. Are you willing to make a statement? Answer. Yes.

‘Question. Now tell us in your own way and language what you know about this housebreaking.’

Mr. Kelly: If your Honor please, so that I may not interrupt counsel at various times in making objections, I now on behalf of the defendant Cush, following out what I said to your Honor when at the bench, desire to object to this particular method of cross-examination of the witness, on the ground that this is an indirect way of reading before the jury of a statement not made in the presence of the defendants, and particularly the defendant for whom I appear, and therefore could not be binding upon him. I therefore object to the reading by Mr. Sirica of anything contained in that statement on the ground that it was a statement made out of his presence and that he had no opportunity to object to it.

Mr. Sirica: This statement was read over in the presence of Cush, Bedell, and Pagliocchini, and the three defendants named denied the statements made by this witness.

Mr. Kelly: Then for the additional reason stated by Mr. Sirica, that at the time the defendant Cush denied the truth of it, I object.

Mr. Sirica: I am not offering it against them.

The Court: The statement up to the present time
20 is not evidence against anybody except Grove.

“Mr. Kelly: I appreciate that, and that is the reason I had not objected to it up to the time where he was asked to tell something about some housebreaking.

The Court: I assume he is going to bring out from the statement facts which, if true, would incriminate the other defendants. It is not evidence as to them at this stage of the case. What will happen later I do not at this time know.

Mr. Kelly: If it is not evidence as to them I object. This defendant Grove is not here on trial having already pleaded guilty.

Mr. Sirica: I have already stated that I am taken by surprise by the answer of the witness, and I now want to cross-examine him about each statement made here in this paper.

Mr. Whelan: Hasn't that statement been identified sufficiently as to time and place and occasion for you now to ask the witness if he did make such a statement.

Mr. Sirica: I think I asked that.

Mr. Whelan: He said that was his signature. It is sufficiently identified now. So why not ask him if he made the statement?

Mr. Sirica: May I proceed, your Honor?

The Court: Yes.

By Mr. Sirica:

Q. Grove, do you remember a little over a week ago, November 18, 1932, to be exact, during the afternoon you were brought up in the grand jury room by a Deputy United States Marshal? A. Yes.

Q. And I handed you this particular piece of paper and asked you to read every bit of it? A. Yes, sir.

Q. And you read it over, and I then asked you if you had read it? A. Yes, sir.

Q. I asked you if the statements contained therein were the truth and you said it was the truth on that occasion, did you not? A. Yes.

21 Q. Yes, Grove, didn't you make this statement:
'About 7 o'clock p. m.'—and, by the way, this is what you read over in the grand jury room, is it not? A. Yes, sir.

Q. Didn't you make this statement: 'About 7 o'clock p. m. July 25th, I met August Pagliocchini alias Mussolini, William Francis Cush, alias Doc, and William Estes Bedell, alias Walsh, on Pennsylvania Avenue between Sixth and Seventh Street, Northwest'. I will ask you if you did not make that statement? A. Yes.

Q. And that is true, isn't it? A. No.

Q. That is not true? A. No.

22 Mr. Whelan: Now, if your Honor please, the witness evidently knows, and he says that statement was made, and then he tells what it is. Why ask him if he made the complete statement.

Mr. Sirica: I submit that I have a right to ask him about the entire statement, line by line.

Mr. Whelan: Your Honor, Mr. Sirica is trying to get it before the jury.

The Court: We might disagree perhaps about what his object is, but I will overrule the objection.

Mr. Whelan: We note an exception.

Mr. Kelly: We note an exception.

Mr. Rose: We also note an exception.

By Mr. Sirica:

Q. Grove, didn't you make this statement?: 'Mussolinia said he has been watching the Breyer Ice Cream Building for about a week, and that a man stayed there until midnight, and after midnight there was no one in there'. You made that statement, didn't you? A. Yes.

Q. Was that true or not? A. That is true.

Q. All right. And didn't you make this statement: 'He said it was an easy job, and Bedell said he would take it'. You made that statement, didn't you? A. Yes.

Q. Was that true or not? A. No.

Q. You made this statement, didn't you: 'We stayed together the rest of the evening, riding around in a Buick roadster driven by Bedell.' That is the truth, isn't it? A. No.

Q. And didn't you state: 'We went to Glenburnie, Maryland, and got back to Sixth and Pennsylvania Avenue, Southeast, about 11:45 p. m.' This is true, isn't it? A. No.

Q. And you stated, didn't you: 'I got my Dodge car and drove to Fifteenth Street, between L and M Streets, Northwest, where I parked.' That is true, isn't it?
23 A. No.

Q. And didn't you state: 'Bedell followed me in the Buick, and I then got in the Buick and we drove to the alley in the back of Bedell's apartment in the Southern Apartments.' That was true, wasn't it? A. No.

Q. You made that statement to the police, didn't you?
A. Yes, sir.

Q. And didn't you state: 'Bedell went into the building and came out with a burlap bag containing tools.' That is true, isn't it? A. No.

Q. Did you make that statement to the police? A. Yes, sir.

Q. And then you said, didn't you: 'We then went to New York Avenue near Bladensburg Road near the Breyer plant, and parked the car.' That is true, isn't it? A. No.

Q. Who went there? A. It was myself and Pagliocchini and two other fellows.

Q. This is the statement that you gave to the police, that is right, isn't it? A. Yes, sir.

By the Court:

Q. Who was it that you said went there? A. Myself and two other fellows and Pagliocchini.

By Mr. Sirica:

Q. And didn't you state: 'I got out and went over in a field to act as lookout.' That is true, isn't it? A. Yes, sir.

Q. And didn't you state: 'Mussolini was to stay by a window and watch for my signal.' That is true, isn't it?
A. Yes, sir.

Q. And you said: 'Bedell, Cush and Mussolini entered the building through a side window.' That is true, isn't it? A. No.

Q. And you said, didn't you: 'After they were in about thirty minutes or forty minutes they came out and got into the car and picked me up on the Bladensburg Road about 500 feet from the Breyer building.' That is true, isn't it?

24 A. I was picked up on the Bladensburg Road, but not by Bedell and Cush.

Q. By whom? A. By Pagliocchini and another fellow.

Q. And didn't you state: 'They drove back to the alley in back of the Southern Apartments and Bedell and Cush went upstairs.' That is right, isn't it? You had been to the Southern Apartments? A. I had been there a couple of times.

Q. And you know that Bedell lives there? A. Yes, sir.

Q. And you know that he lives there under the name of Walsh? A. No.

Q. What name did you know him under? A. Bedell.

Mr. Whelan: Are those matters in the statement?

Mr. Sirica: No. I will withdraw that.

Mr. Whelan: We ask that it be withdrawn.

The Court: Very well.

By Mr. Sirica:

Q. You said, didn't you: 'They drove back to the alley in back of the Southern Apartments and Bedell and Cush went upstairs, while Mussolini and I parked the car on M Street.' That is true, isn't it? A. No.

Q. And you said, didn't you: 'Mussolini and I came back and met Cush in front of the Southern Apartments and he handed me between \$10 and \$20.' That is true, isn't it? A. No.

Q. Who handed it to you? A. Pagliocchini gave me between \$10 and \$20, but not there.

Q. And you said, didn't you: 'After he handed me the money Mussolini said he would be seeing me, and I left him and Doc there.' That is right, isn't it? A. No.

Q. You know this man Cush by the name of Doc, didn't you? A. Yes, sir.

Q. That is the name you knew Cush by? A. Yes, sir.

25 Q. And you said, didn't you: 'I went and got my car, which was parked on Fifteenth Street between L and M Streets, Northwest, and drove to my house at 510 D Street, Southeast.' That is right, isn't it? A. No.

Q. You didn't do that? A. No."

* * * * *

Thereupon the witness, on being asked how many times he had been threatened in this case, replied that he had not been threatened at all. Whereupon the following occurred:

“Q. Didn’t you tell us on one or two occasions that you were threatened? A. No.

Q. I will direct your attention to this particular instance: Do you remember the time that you were over in Police Court, last summer? A. Yes, sir.

Q. And when you testified against these men? A. Yes, sir.

Q. And told practically the same story that is detailed here in the statement that I have read to you? A. Yes, sir.

Q. And when you first talked to me, you told me that was the truth, the statement you have made? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And then, five or ten minutes later, when you were in the cell, you sent word up you were not going to testify? A. Yes.

Q. And in the meantime I sent for detective Talley, who was outside, and I said to you, ‘What is the matter? Are you afraid? And you said, ‘Yes’. And I said, ‘What has happened?’ And you said, ‘I just went upstairs, and Mussolini called me over and said, I will find myself out in a gutter if I told that.’ Do you remember that? A. Yes.

Q. You did say that? A. Yes.

Q. Mussolini threatened you downstairs, didn’t he? A. Mussolini asked me, when I went up on the stand, to tell the truth.

Q. Did you tell the truth? A. No.

26 Q. What did you say? A. When I went up on the stand, I put Bedell’s and Cush’s names in it, but I had two——

Q. Who were the others? A. Fox and Bichert.

Q. The first time you have mentioned their names? A. No.

Q. How long have you known those people? A. I have been knowing Fox over two years.

Q. How long have you known Bichert? A. Since I started this racket.

Q. Did you see them on the night of June 26th? A. Yes.

Q. Why did you put Cush and Bedell in their places, if they had nothing to do with it? A. For the simple reason, on the night of the Earnshaw job, nobody knew I had such

tools in my car, excepting Bedell. My car was taken away from in front of my house that night. And one night Fox and Bichert got me and went into Bedell's apartment, and we went in and got some clothes and came outside. And we took them to my sister's house, in Seat Pleasant, and left them, and went out on a party. And then I left them, about 2 o'clock on Sunday morning, August 28th, at 7th and the Avenue, Southeast, because Mr. Bowers, in the case, seen me. And I was pretty well drunk, so I left them there and went in and got a sandwich and a cup of coffee. When I came out they were gone, because Bichert wanted to get home. I went over to a friend of mine, George Singleterry, he is a Diamond hacker, and asked him to take me home, and he said he was going out that way about 6 o'clock, and if I went to his room, and stayed there, he would take me out. I went to his room and about 5:30 came back to the corner of 7th and the Avenue and he was there, and I got in the cab and went home, and I stayed at my sister's until the police came out to get Pagliocchini and myself.

The Court: I don't understand yet why you put Bedell and Cush in this statement.

Mr. Sirica: That is what we want to find out.

The Witness: Well, I put them two in the statement to shield the other two boys.

27 By Mr. Sirica:

Q. That is the first time you have given their names out?

A. Yes.

Q. That is right, that is the first time? A. Yes.

Q. I believe, when you were brought to Headquarters, you freely admitted everything, in the presence of Talley, and your father: that is right, isn't it? A. Yes, sir.

Q. Is that right? A. Yes.

Q. When you made the statement in Headquarters, your father was present, and your father told you to tell the truth, didn't he? A. Yes.

Q. And you did tell the truth, didn't you? A. No.

Q. How did you happen to think about Bedell and Cush at that particular time? A. Well, I was in No. 4 Precinct—I was locked up there several hours, then I was taken to Headquarters, and when Officer Bowers told me that my car was on 10th Street, Southeast, and they had found

tools in it pertaining to the Earnshaw job, I figured that Bedell and some of his friends were the only ones that done it, taken my car and went there.

Q. Is that all?

Mr. Whelan: If your Honor please, if that is the reason why he used Bedell's and Cush's names in this statement, that he used their names—his reason is not stated; I think we should have it.

The Court: Nobody is objecting.

By Mr. Whelan:

Q. Was that your reason, you thought they had taken your car, and that is the reason you put their names in here, instead of Bichert and Fox; is that right? A. Yes.

By Mr. Sirica:

Q. Grove, you have been with Bedell in a Buick roadster, haven't you? A. No, sir.

Q. Never seen him in a Buick roadster? A. I have seen him in a Buick roadster.

28 Q. And you told Officer Bowers in this statement about Bedell and Cush being mixed up in it, didn't you? You gave him the information about Cush and Bedell? A. I told him about Bedell.

Q. And you didn't call him Cush; you called him Doc? A. Yes.

Q. And it wasn't until they put him in front of you that you knew he wasn't Doc? A. Yes, sir.

Q. And you knew Pagliocchini as Mussolini? A. Yes.

Q. How many times have you been in Bedell's apartment house at 15th and M Streets? A. Twice.

Mr. Whelan: I object.

Mr. Sirica: I can show that.

Mr. Whelan: This was a question of surprise. This witness said he made that statement, and it wasn't true. That is the end of this surprise.

Mr. Sirica: I think I can bring out—I will drop that, the reasons which my prompt him to deny that statement at this time. I won't press the other point.

By Mr. Sirica:

Q. Now do you remember this other occasion, up in the grand jury room last week, when you read the statement

over, and you said it was the truth, and we asked you what you were afraid of, is that right? A. Yes.

Q. And you said, 'Why, you can't tell what a fellow like Bedell will do if I tell something about him, you will be found in the gutter with a slug in your back.' Did you say that upsairs? A. No.

Q. You deny you made that statement upstairs? —. Yes.

Q. All right. You deny that? A. Yes.

Q. One other thing. We talked up there for a while, and you said that you were afraid of Bedell and Cush, or those boys you were going to testify against, didn't you?

29 You were afraid of them, weren't you? A. A little, yes.

Q. A little? A. Yes.

Q. Why were you afraid of Bedell? A. I wasn't particularly afraid of Bedell. I was more afraid, particularly afraid of Pagliocchini.

Q. You had always put Pagliocchini in the picture? A. Yes, sir.

Q. You remember telling us upstairs, 'It is all right for you prosecutors, but how would you like to walk up in your cell and find a 3-inch blade knife there? Wouldn't you think before you testify?' A. Yes.

Q. Didn't you make that statement? A. Yes.

Q. And you did find—that is all.

Cross-examination.

By Mr. Whelan:

Q. Now tell the jury about the robbery. Go ahead. Just tell the jury. You said there was Bichert and Fox with you? A. Yes.

Q. Go ahead and tell the jury about the robbery, how the robbery was committed, and what part you played in it. A. Well, on July 25th here, I met Pagliocchini and Bichert, they coming to my house, 510 D Street, Southeast, and getting me; and from there I got in the car, and we rode around until about 11:30, I guess it was, and we was talking about Breyer's Ice Cream Company. Pagliocchini says to Bichert and myself that he had been watching for the Breyer's Ice Cream Company, and there was a man there until 12, or quarter to 12, and that he left, and another watchman came on about a quarter after 12,

at the latest. And that it was easy, and we could take it, and we would have plenty of time getting in there before that watchman came. So Bichert said, 'All right. We will go down and take it.' All right. We went out to Bichert's house and got the tools. And from there we went back to New York Avenue, in back of Breyer's Ice Cream Company and parked. And we got out and went across the field to the back of the Ice Cream Company, and there I had a flash light in my hand, and it lit somehow or other, and Pagliocchini kind of got mad, or something, 30 anyway, we had an argument. So then we had a little argument, and we went up to the side window of the Ice Cream Company, and broke one of the windows, and unlocked it, and went in. There we waited for the watchman, and after the watchman had come in, Pagliocchini and Bichert held him off with a gun, while I tied his hands with a piece of wire. Then they went upsairs, and I was supposed to watch the watchman. And when they come down, my back was to the watchman. Pagliocchini, he threw a hammer at me, and we started to arguing again. Well, anyway, Bichert said to Pagliocchini, 'you go on ahead and get the car and meet us on the road'. He says, 'all right'. And he went and got the car, and we met him about 500 feet from the Breyer's Ice Cream plant on Bladensburg Road, and headed into town, this way.

Q. Did I understand you to say a hammer was thrown at you? A. Yes, sir.

Q. Are you afraid of Bichert? A. Bichert? No.

Q. Now let me ask you this: You have been in jail, have you not, since your arrest? A. Yes, sir."

The witness then testified that about three weeks prior to the date of the trial, a man came down to the jail where he was and made a speech about putting innocent people in jail, and that he realized it was wrong to put innocent people in jail, and thereupon sent a note to the defendant, Bedell, asking him to have his attorneys interview him. As a result of that, one of Mr. Bedell's attorneys came to see him and he told the same story that he testified to in Court. That he was not promised anything if he plead guilty, and that he was not promised anything when he made the statement to the police and that his only reason for putting Cush and Bedell into the case was because he

thought Bedell had used his car and that he was trying to protect Beichert and Fox.

(Thereupon, a man named Lee, a watchman at Breyer's Ice Cream Company, was brought into the room and the witness identified him as the watchman who was
31 there on the night of the robbery.)

(The witness testified that he, the witness, tied the man up, but that he did not tell this to the police; that he did not say that anyone had done it; he admitted that he bound the man up. When asked the question as to who threatened him, the witness stated that: "I was threatened in the bull pen in the police court, Pagliocchini says to me, he says, 'Jimmy, if I was you, when I got up on this stand here, I would tell the truth about this thing'", and that was what he meant when he said he had been threatened. Thereupon, in response to the Assistant United States Attorney, the witness testified as follows:

"Q. You remember, when we were up in the grand jury room, on November 18th, don't you? A. Yes, sir.

Q. We were talking up there, and after you walked in, and we questioned you, and I asked you why you were afraid of these men; do you remember that? A. Yes, sir.

Q. You said, 'Why, you can't tell what a cokehead like Bedell would do if I go out on the street'. Didn't you make that statement, in the presence of your father, and Talley and Bowers? A. I don't remember.

Q. Do you remember referring to him in that way? A. No.

Q. You never made any such statement? A. No.

Mr. Sirica: That is all."

The witness further testified that Bedell had never threatened him and that he had never talked to him about the matter; that he had sent word to the District Attorney's Office that he wanted to tell the truth about the matter, but had never been given an opportunity to sit down and tell the truth about the matter. Thereupon, in

response to the questions by the United States
32 Attorney, the witness further testified that he remembered going upstairs when Mr. Collins, Assistant United States Attorney and Mr. Sirica were both present; that he did not read over the statement but he

told Mr. Collins that everything in it was true; that he came back in five minutes and told Mr. Collins that these statements were not true, which was said in the presence of both Mr. Collins and Mr. Sirica, and when asked to name the two men who were with him, the witness said he did not answer that question one way or the other and that the reason for naming the two men now was that he did not want to put two innocent men in, rather than the ones who were guilty.

Herbert Lee was called as a witness on behalf of the Government and testified as follows:

That he was employed by the Breyer's Ice Cream Company to clean up the rooms and the garage; that on July 26th, at about one o'clock in the morning, when he went in, three men ran up and turned guns on him and grabbed him.

(The witness thereupon identified the defendants, Bedell and Pagliocchini as being two of the men, but could not identify the third man.)

The witness further stated that the two men he identified were working on the safe; they told him that they were working upstairs; that they went upstairs and when he commenced rattling a can they carried him down on the running board of the machine; that thereafter, they tied him up with some wire; that one stood up and the other tied him up; that he was tied up for four hours until a policeman came to undo him; that two or three days later, two men he identified were two of the men he saw at headquarters; that he went to headquarters three times; the first time he did not see the two men, but he saw them
the second time; that there were five lined up
33 altogether and he picked these two men out at the time.

On cross-examination the witness testified that he was 70 years old; that there was no light in the place; that it was dark and that the only way he could see was by a light from the street and that it was about one o'clock in the morning; that he could see when the men came under the light; that he could see well because he could see when they came under the light; that one did not have any cap on, but had a handkerchief over his face; that

he couldn't tell which one had the handkerchief over his face, but that he was taller than the rest; that the shortest one tied his hands and feet; that the others were right there; that the shortest one had a cap on, but he couldn't tell the color of it. That he could not identify the third man because he stayed in the dark; that he was positive about the other two although it was the only time he saw the men except at police headquarters. Whereupon, the following occurred:

"Q. Now at Police Headquarters, do you remember a man saying to you, 'Uncle, have you ever seen me before?'

A. Yes, sir.

Q. And you told him you hadn't seen him before? A. I told him I hadn't seen him before that night, that is what I meant.

Q. That is what you meant, that you told him you hadn't seen him before? A. No, sir; before that night, I hadn't seen him.

Q. Didn't you correct that statement after some detectives had talked to you over there? A. I told him, yes, that they had me in there.

Q. Was the man in this line whom you identified, did they have caps or hats on? A. One had a hat on, I don't remember whether the other one had a hat on or not.

Q. Now how many times did you see men that were put up in this line? A. There was five of them put up.

Q. How many different times were the five men
34 put up? A. I saw them twice.

Q. Were they the same men? A. The same men.

Q. And you didn't identify them the first time; is that your testimony? A. Sir?

Q. The first time, you didn't identify them? A. No; they didn't get them two until the next time.

Q. Let me ask you: The first time, how many men were put up? A. Two.

Q. And you didn't identify those two? A. No, sir.

Q. How many were put up the next time? A. Five.

Q. Now were the two in the crowd of five? A. Yes, sir.

Q. Now, I mean, the same men that you didn't identify, were placed in the line the second time? A. No; they wasn't in the line at all.

Q. Then those were five new faces in the line after the first time? A. Yes, sir.

Q. And it was then you picked them out? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now did you talk to anybody before you picked out those people? A. No, sir; I didn't talk to a soul.

Q. While you were down there—— A. No, sir.

Q. You were down there, I say? A. Yes, sir.

Q. How long were you there? A. About a couple hours.

Q. Those men were put right under a big light at Headquarters? A. Yes, sir.

Q. You could see them very plainly? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

35 Mr. Whelan: May I have, if the Court please, Mr. Grove step up a moment?

By Mr. Whelan:

Q. You csn see pretty well, Mr. Lee, can't you? A. Not so good.

Q. Can you look up at the clock? Can you see a clock in the court room? A. Yes, sir.

Q. Can you tell the time? A. Twenty minutes to 3.

Q. Twenty minutes to 3?

By the Court:

Q. What time did you say it was; what time by the clock?

A. A quarter to 3."

Thereupon the witness Grove was called into the Court room and the witness Lee was asked if he had seen him before, and said he saw him on the morning of the trial, but did not see him the night of the robbery, but he had heard the witness called Grove. That he did not remember seeing him before; that there was someone at the robbery that might have been a little taller than the witness Grove; that the two men who broke the safe open were about the same height; that he only saw three and that the third man was about as tall as Grove; that he did not know whether or not he looked like Grove because he stayed in the dark, but at that he was about the same size.

Mrs. Lottie L. Boone was called as a witness on behalf of the Government and testified as follows:

That she was employed as manager of the Southern Apartment House at 15th & M Sts.; that she recognized the three defendants, but could not be positive of her identifica-

36 tion of the witness Grove; that during the month of July, the defendant Bedell rented an apartment under the name of J. B. Walsh according to the record which was produced and kept the apartment until August 22nd; that during the time he had the apartment, she saw all three defendants at the apartment.

Raymond Bunn was called as a witness on behalf of the Government and testified as follows:

That he operated an elevator in the Southern Apartment during the months of July and August; that Bedell had an apartment there during that time and that he thought he saw the three defendants going up and down on the elevator, but was not sure about the witness Grove; and that he thought he saw them during the month of July; that he went to police headquarters and identified the three men when they were arrested.

Joseph F. Bowers was called as a witness on behalf of the Government and testified as follows:

That he was a member of the Metropolitan Police Force, assigned to duty to the Fourth Precinct during July and August, 1932; that on the 28th day of August, he saw a Dodge automobile on Tenth Street between L and M, in the rear of Earshaw's warehouse; that there was some tools, punches, and four chisels in it. Whereupon the following occurred:

“Q. Mr. Bowers, keep your voice up. Did you make an investigation to find out who that automobile belonged to?

Mr. Kelly: I object to that.

The Court: He can say whether he did, or not.

Mr. Kelly: I am not objecting on that ground. I am objecting—what he is about to is August 28; is that
37 correct? Did you mean July 28th, or did you, Mr. Bowers? A. No, sir; August 28th.

Mr. Kelly: I want to object, on the ground that what he may have seen or done was too remote with respect to defendant Cush, on the 28th of August. And I object.

The Court: I will overrule the objection.

Mr. Kelly: Your Honor will give me an exception?

The Court: It may turn out to be too remote.

Mr. Kelly: An exception.”

The witness further testified that an investigation developed that the car was listed to James Grove; that he located Grove at Capitol Heights, together with the defendant Pagliocchini, where he placed them under arrest and took them to the police precinct. As a result of information obtained from Grove, he arrested Bedell and Cush on the following day in front of the Southern Apartment; later on he talked to the men; Cush and Bedell denied knowing Grove and Pagliochinni until they got to headquarters when Bedell admitted he knew Grove, but only as Jim; that the witness said that he saw the witness Lee at Headquarters on the 31st of August, at which time he stated that Lee had picked out Bedell and Pagliocchini as the ones who tied him up.

On cross-examination the witness testified that another man named Hampton was arrested with Bedell and Cush; that he talked with Bedell and Cush three or four times and that at all times they denied any connection with the robbery; that Bedell was put in the line-up on two occasions; that as he remembered it, the witness Lee identified Bedell the first time he was put in the line-up, but that he could not recall whether he identified him on both occasions; that he did not remember Bedell asking the
38 witness Lee at Headquarters the question, 'Uncle, did you ever see me before?', but that he heard Bedell and Lee talking after the line-up. Whereupon, the following occurred:

"Q. What was said by each of them, if you know? A. Bedell told him that he wanted him to be sure, that it was a serious thing, or words to that effect, to make positive of an identification. That may not be the exact words."

Witness further stated that this was after the identification, but that he did not remember hearing the word 'uncle' used.

Carlton Talley was called as a witness on behalf of the Government and testified as follows:

That he was a member of the Metropolitan Police Force attached to the Robbery Squad and that he recognized the defendants and knew James Grove; that he was present when a statement was made by Grove. (He identified his signature on the statement.) Witness testified that he was

present when the statement was made in the presence of Grove's father; that he remembered that on November 18th, about a week prior to the trial, when Grove was brought to the grand jury room, the witness was present with others when Grove read the statement over and stated that it was true. That he remembered that Grove said, in reply to a question that he was afraid of this bunch, 'Why, you don't know what this cokehead, Bedell, would say if he got out of jail, or I got out'.

On cross-examination the witness testified that he was present when the men were put in the line-up at headquarters on August 31st; that to his knowledge Bedell was only put in the line-up once and that Lee was there; that
39 he heard the conversation afterwards between Lee and Bedell and that Bedell told Lee he had made a mistake; that he could not recall that Bedell referred to Lee as 'Uncle' or asked him whether or not he, Lee, had ever seen him before.

On redirect examination witness testified that Lee did pick out Bedell and Pagliocchini as two of the men who robbed Breyer's Ice Cream Company.

On further cross-examination the witness testified that Grove did not tell him about Bichert or Fox; that he knows Bichert as a baker who has been involved in a safe robbery; that he knew there was a safe robbed at the Breyer Ice Cream Company. Witness further testified that he did not know the man named Fox and that Grove had not said anything to him about them in the grand jury room.

James F. Grove, Sr., was called as a witness on behalf of the Government and testified as follows:

That he was a member of the District of Columbia Park Police and the father of the witness, James Elam Grove. Whereupon, the following occurred:

"Q. Now do you remember an occasion in the grand jury room on November 18, about a week ago——

Mr. Kelly: If your Honor please, at this time I want to object. I think we have a good picture of what occurred in the grand jury room.

Mr. Sirica: We have a right to show everything that occurred there.

The Court: I am not sure about that. The only thing about that statement, it is evidence against him.

Mr. Sirica: The thing is this: Grove made a statement up there that certain threats were made in the grand jury room. The only purpose of showing this was to show that those statements were made by him in our presence.

Mr. Kelly: Talley has already testified to it.

Mr. Sirica: I don't want to be put in the position of them saying we didn't prove it.

The Court: I don't think they can comment on that. It is purely a collateral matter.

Mr. Sirica: That is correct.

The Court: I doubt that you can, against objection, put everything that took place.

That is all."

Whereupon **Mr. William H. Collins** was called as a witness on behalf of the Government and testified as follows:

That he is Assistant United States Attorney and had been for seven years; that he knew the defendant, Grove. Whereupon the following occurred in the presence of the jury:

"Q. Do you remember an occasion a short while ago, when Grove was up in our offices, and you talked with him with reference to statements he had made in this case? A. I do.

Q. What, if anything, did he say on the first occasion when he was brought up, when I was present?

Mr. Kelley: We object. He has already admitted that he made the statement to Mr. Collins.

Mr. Sirica: Well, he has denied that he made certain other statements up there.

The Court: Now, let us see where we are. He was put on the stand and shown his statement—No; he was put on the stand first and asked questions.

Mr. Sirica: That is right.

41 The Court: As a result of his answer to that question, I permitted you to examine him as a hostile witness.

Mr. Sirica: That is correct, your Honor.

The Court: Now in the course of that examination, he admitted that he had made the statement, and he gave cer-

tain answers and also went on and told things that were in it that were not true.

Mr. Sirica: That is right.

The Court: Now, even if he had said that that statement was true, and every word in it was true, it would not be admissible against these other defendants.

Mr. Sirica: The only purpose of putting Mr. Collins on——

The Court: The only purpose that I can see would be to in some way give credence to the facts that were in the statement, by showing what he had said on another occasion. You can't prove anything to make that statement evidence, and you can't, as I see it, make statements that he made to Mr. Collins admissible against these others.

Mr. Sirica: We are not trying to show that.

The Court: We have gotten pretty far afield.

Mr. Sirica: He denied certain statements; he denied saying certain things to Mr. Collins and myself in the office. The only purpose of putting Mr. Collins on is to show that he did say those things. We are taken by surprise. In the grand jury room, I want to ask Mr. Collins about what took place up there.

The Court: What is the evidentiary value? Supposing he says that as a reason that he did not stick by his statement was because he was terrorized.

Mr. Sirica: There seems to be no question about it. I withdraw the witness.

The Court: That he had been terrorized. If he had made any accusation against you or Mr. Collins that you tried to intimidate him, I would allow it.

42 Mr. Sirica: We wanted to prove everything before the jury. But I withdraw Mr. Collins at this time.

The Court: I don't see that everything you can do would bring back into the picture anything but that he repudiated it. I don't think you can do that.

Mr. Sirica: We have offered the statement and the other exhibits, and we rest at this time."

* * * * *

"The Court (interposing): Last afternoon just as we adjourned, I think, Mr. Sirica, you offered in evidence the confession of Grove, did you not?

Mr. Sirica: The statement by which we sought to impeach the witness Grove, your Honor.

The Court: Is that admissible?

Mr. Sirica: Not as against the other defendants, but I contend it is admissible for the purposes already stated.

The Court: It is only admissible as against him and he is not a defendant. I am afraid I will have to refuse it. It couldn't be read as against these defendants.

Mr. Sirica: The only reason I offered it was because it was a statement the defendant Grove made to us and used here when he became a witness under the circumstances I mentioned.

The Court: If he were a defendant here in Court, it would be different. But he is not a defendant here today.

Mr. Sirica: I am prepared to show your Honor some cases at this time on the admissibility of statements in evidence where a defendant pleaded guilty, in cases similar to this, only in one case it was a robbery, where the man was placed on the stand and gave testimony different to that which he had stated to the District Attorney when upstairs. At the time he made the statement he had signed it. He was shown that statement and his statement was used in evidence, and was offered in evidence, the same as we did in this particular case. I should like to show your
43 Honor this case before you rule on that point.

The Court: I will be glad to see any cases you may have, of course.

Mr. Sirica: I will send for them.

The Court: Even if he had not repudiated the statement it would not be admissible against the others here.

Mr. Sirica: We do not contend that, because they denied it.

The Court: How in any aspect of the case is it admissible as against the other? Even if Grove had not repudiated the statement at all, how could it be admissible as against them?

Mr. Sirica: We do not contend it is admissible against these defendants at all. The only reason we offered it was to show the inconsistent statements Grove has made, at this time as compared to the statement he made before. It is admissible to impeach the witness Grove.

The Court: If Grove were on trial here of course it would be admissible against him, and then his statement or evidence repudiating it and all that would have been a matter for the jury to consider.

Mr. Sirica: Here is the position we are in, your Honor: We put the witness Grove on the stand. He told us the last time we talked to him that the statement he first made and which he read over was a true statement. Then when he came on the stand and we were taken by surprise your Honor gave us the right to cross-examine him and use it as an inconsistent statement.

The Court: To treat him as a hostile witness.

Mr. Sirica: Yes. And that statement was offered to show the statement that he first made, and it is for the jury to say whether he told the truth the first time or here on the stand.

Mr. Kelly: Oh, no.

Mr. Whelan: Oh, no.

The Court: Suppose Grove was telling the truth at first, it would not be evidence against the other three defendants unless it was read in their presence and either by
44 silence or in some other way they, one or more, acquiesced in it, unless there would have been an admission of its truth by their acts or conduct."

* * * * *

"The Court: You certainly could not read that statement to the jury as evidence against these three defendants.

Mr. Sirica: No, your Honor, and I am not so contending. But I am contending that——

The Court (interposing): For what purpose is it admissible? If it would be admissible at all as I see it, it would be only for the purpose of showing your good faith, Mr. Sirica, in asking these questions."

* * * * *

"The Court: Well, I can see how it might be admissible if the claim were made that you were bound by the testimony of the man on the stand. It would be admissible to show you are not bound by it.

Mr. Sirica: That is the point we want to impeach the witness on.

The Court: It comes down to the point of showing your good faith, of relieving you of any possible charge of trying to put before the jury evidence that you knew was true.

Mr. Sirica: Doesn't it come down to this regardless of that, that when we place a witness on the stand we vouch for

his credibility. We say he is going to testify to certain things, as I outlined in the statement to the jury on yesterday; everything that he told us in that statement practically I told the jury on yesterday. When I put him on the stand I expected him to follow that statement, because that was the last statement he told us as the truth. When he testified differently I announced I was taken by surprise and asked the right to cross-examine him. That statement is admissible against him, to show that we are not bound by his testimony that he gave on yesterday in court, and we offered it to impeach him. I do not see any harm that is being done by admitting that statement. It was done in the other case.

Mr. Whelan: If your Honor please, we say that the District Attorney was not taken by surprise, by reason of the fact that——

45 The Court (interposing): I do not want that point argued. We have been over that here at the bench.”

* * * * * * *

“Mr. Whelan: Following up the observations made at the bench on yesterday, as to Bedell I do not believe the statement is admissible, I do not believe there was sufficient surprise, and do not believe it is proof that should go to the jury. So we note an exception.

The Court: All right.

Mr. Sirica: We offer again in the record a statement showing the occupancy in the Southern Apartments, Fifteenth and M Street, Northwest, an apartment by Bedell known under the name of J. B. Walsh, which was offered on yesterday and I think received without objection. I am now just renewing that offer.

Mr. Whelan: I object to that.

The Court: What is that corroborative of?

Mr. Sirica: It is corroborative evidence in the case that this defendant Bedell did live in the Southern Apartments, and that he lived there under the name of Walsh. Whether or not that makes any difference or not we are not arguing now, but it is evidence to show that he was arrested at the Southern Apartments, and that he lived at the Southern Apartments. All these circumstances I submit to go to the jury.

The Court: Well, it has already been received, has it not?

Mr. Sirica: Yes, I think on yesterday.

The Court: I will allow that.

Mr. Whelan: Your Honor will permit us an exception.

The Court: Yes.

Mr. Sirica: We rest."

Thereupon counsel for the Government rested his case. Counsel for the defendant Bedell moved the Court to direct a verdict in his favor, which motion was over-
46 ruled and an exception duly noted.

Thereupon **August Pagliocchini** was called as a witness and testified as follows:

That he lived in Washington about 24 years; that on the day the Breyer Ice Cream Company plant was entered, he met Grove; that he had been meeting Grove regularly for about 2 months previous and that they went to the Breyer Ice Cream plant; that that night three of them went together in his automobile; that they parked near Langdon where they crossed the railroad tracks and went across a field near the Breyer Ice Cream plant where they stayed for about half an hour; that they waited until they saw a man leave; that when the man left, he took a bus, and that they then broke open a window and entered and waited for the watchman to come; that when he came in they surrounded him and one party wanted to put him in the ice-box, but witness objected to that so they tied him with his hands behind him, and left Grove to stand by and watch while the other boy and the witness went upstairs to do the work; that the watchman was the man named Lee who testified; that after they did the work they went out and got in the witness' machine, went over to Langdon, walked through Bladensburg Road and Queens Chapel Road and came back and picked up the other man. Whereupon witness testified as follows:

"Q. Now, was the defendant Bedell with you? A. No, sir; he was not with me.

Q. Was he with you at any time during that evening? A. No. Bedell was not with me at any time at that time. In fact, I have met Bedell later on, after the first week of August.

By Mr. Sirica:

Q. What was that? A. I met Bedell after the first week of August."

47 On cross-examination the witness testified as follows: That he did not remember how much money he got out of the safe, but that it was around eight or nine hundred dollars; that Grove got at least \$300; that there was no ringleader as they all planned it together. When asked who was the third man, the witness testified as follows:

"Q. You say 'we all'. Who was the third man you mentioned? A. Well, I don't care to bring this man up. James E. Grove has brought the man's name into court and I don't care to mention his name.

Q. He mentioned his name. What is it? A. I called him Buggy all the time. That is the only name I know him by."

The witness further testified that they had met at Fifth and D Streets, Southeast; that it was not by pre-arrangement; that he had talked to the other fellow that day at Lincoln Park; that the reason he happened to be in that neighborhood was that his wife lived there and he went to see her nearly every day; that he had gone there at about ten o'clock in the morning and stayed there until pretty late in the afternoon; that the man Buggy was with him and that he had previously met him at Fifth and D Streets at about 9:30 in the morning; that when they were together they talked about the Breyer Ice Cream matter; that all three had been watching the Ice Cream plant and knew that the man left about 12 o'clock. The witness further testified that he had known Grove about a year, during which time the occupation of the witness had been that of a cab driver. Whereupon, the witness testified as follows:

"Q. What would you do with Grove on the different occasions you would go out with him? A. What would I do with him?

48 Q. Yes. Why would you be with Grove on so many different occasions? A. Well, it was just like us getting together, and we would all three go around together. We would drive around together.

Q. You would get together for what? A. Well, for the past month before that we got some foolish notions in our heads.

Q. What were the foolish notions you got in your heads?

A. To go around and make up some money somewhere.

Q. How much money did you get altogether? A. I don't know.

Q. You didn't fool with any little jobs, did you? You fooled with safes all the time, didn't you? Is that right?

A. Yes, sir.

Mr. Rose: I object.

The Court: I will overrule the objection."

The witness further testified that on July 25th, he met James Grove in front of his house at 510 D Street, Southeast; that the last time he was at that address was the night before they were locked up; that he was at Grove's house the same night that they robbed the Breyer Ice Cream Factory; that they met there by arrangement at about 9:30; that they all three had automobiles; Grove had a Dodge car, and when asked if he had an open Buick, witness testified that he did not and that no one did; that he had not seen Bedell in an open car; that he had known Bedell since the first week in August; that he had met him in his apartment where he went to sell him an automobile; that he was taken up there by a fellow who informed him that Bedell wanted to buy an automobile; that he had a Chandler roadster for sale; that the man who took him up there he met between Thirteenth and Fourteenth on New York Avenue, but that he did not know his name, but knew him to speak to; that the man was not a taxicab driver; that the man told him the party who wanted to buy the automobile was a man by the name Biddel; that he
49 had never known Biddel before and didn't know his business; that he had not been hanging around with Bedell, but had been to his apartment three or four times; that he did not know that he went under the name of Walsh; that Bedell did not buy the automobile and that he did not start hanging around with Bedell after that; that he went up there three or four times at the most, and each time for the purpose of selling an automobile; that he was not with him shortly before July 25th; that he did not see him in July; that he met Bedell right after the first week in Au-

gust; that he saw him about a week before the 28th of August; that he did not want to give the name of the third man because his name had already been brought up; that he did not know where the man lives, but he met him at 715 Sixth Street, the home of a friend of his; that he did not know the third man's business; that he did not want to bring his name into it because he wanted to protect him. The witness further testified that he was called Mussolini as a friendly name because his own name is so large; that he was questioned by police officers at headquarters about this matter and denied it. Whereupon, the witness testified as follows:

“Q. Why didn't you tell the police officers about the third man when you were first questioned? A. Because, I didn't care to bring anybody into it.

Q. You didn't want to bring anybody into it? A. No.

Q. You would bring somebody into it in order to save an innocent man, wouldn't you? A. Well, here is how the thing stands——

Q. (Interposing.) Would you or not?

Mr. Whelan: Let him finish his answer.

Mr. Sirica: Let him answer my question and then he can explain it.

50 Mr. Whelan: Counsel for the Government has asked a question and now the witness wants to tell about it and he won't give him an opportunity.

The Court: Let him answer the question.

By Mr. Sirica:

Q. Answer my question. You would bring a man in that you knew was guilty in order to save an innocent man, wouldn't you? A. Well, the way the thing was is this way——

Mr. Whelan (interposing): I object.

By Mr. Sirica:

Q. Would you bring a man in that you know was guilty in order to save an innocent man? A. I don't care to answer.

Q. Answer yes or no.

The Court: He says he does not care to answer.

By Mr. Sirica:

Q. You remember going to the Police Court last summer when this boy Grove was locked up, don't you? A. Yes, sir.

Q. Going in the Black Maria? A. Yes, sir.

Q. And you remember telling him not to tell anything, don't you? A. Telling him not to tell anything?

Q. Yes. A. I didn't tell that. I told him to tell the truth. I said to get these men out, that they didn't have anything to do with it.

Q. Why didn't you tell the truth on that occasion? A. Well, I just didn't want to talk about it.

Q. Why did you put Grove up to all your dirty work? A. I didn't put Grove up to dirty work. He told the thing, but he told in a complicated way, and I let it go at that.

Q. You were downstairs locked up? A. Yes, sir.

51 Q. Grove came back after he talked to me, and you had heard he had talked to an Assistant District Attorney, hadn't you? A. I didn't know he had talked to anybody.

Q. You talked to him after he came downstairs, didn't you? A. I didn't talk to him.

Q. What did you say to him? A. I didn't say anything, but I told him he was punk.

Q. He is punk in your estimation, is that it? A. Yes, sir.

Q. Because he won't protect you or some of your friends? A. No, because he didn't bring up the truth about the thing.

Q. You remember now the particular occasion I am referring to, in the Police Court, when I sent for him again and took him back up and he said he would testify. You had talked to him then? A. No.

Q. You say you told him to tell the truth? A. Yes, sir."

The witness further testified that he did not say anything at the Police Court because he was not called to the stand. In response to questions why he did not tell Officer Talley that the witness Grove was not telling the truth, the witness testified:

"A. I told him that.

Q. When did you tell Talley that? A. At the Police Court.

Q. Did you tell him the truth about it? A. He asked me was the statement true and I said no.

Q. The statement was true about your going to the Breyer Ice Cream Company? A. But it was not true about his bringing innocent people into it.

Q. Why didn't you tell Officer Talley about your going to the Breyer Ice Cream Company plant? A. I didn't care to tell him, is all.

Q. You remember over at Headquarters when in
52 the room with Grove that Grove had made a statement and you made some remark to Grove over there, and you called him 'a little punk' or something, didn't you. A. Over at Headquarters?

Q. Yes. A. I did not.

Q. Of course you wouldn't do anything to Grove if you could get your hands on him? A. No; I wouldn't do anything to him.

Q. No, not at all I suppose. How many times have you threatened this boy? A. I have not threatened him at all.

Q. You never saw him at all? A. I never threatened him at all.

Q. Did you have anything to do with putting a knife in the cell at the jail? A. No. I had nothing to do with putting a knife in the cell. Besides, the way you are searched when going into the jail it is impossible to carry a knife into it.

Q. I am going to ask you again to tell us who the third man is who was on this job. A. I have been knowing him by the name of Buggy.

Q. How many jobs have you done with him?

Mr. Rose: I object to that.

Mr. Sirica: I want to question him on it to show how well he knows him.

The Court: You have a right to cross-examine the witness.

By Mr. Sirica:

Q. Was that the first job you had done with this man Buggy? A. No.

Mr. Rose: Your Honor, I object to that.

The Court: On what ground?

Mr. Rose: On the ground that this is aside from the matter now before the Court.

The Court: It would affect his credibility.

Mr. Rose: It would incriminate him."

53 When questioned as to who stayed outside of the Breyer Ice Cream plant, the witness stated that nobody did; that there were four men at the place including the watchman; that they waited inside of the building for the watchman to come; that they broke the safe open after the watchman came in and that they knew the watchman would come in and had known it because they had been watching the place for three weeks; that the boy Buggy and Grove were with him. When questioned with reference to the man named Fox, the witness testified that he knew him; that he lives at Eleventh and K; that Fox was not with him on that occasion or other occasions; that he did not tell the police anything about it. In response to an examination by Mr. Whelan, the witness testified that it was close to 12 o'clock at night when they entered the place; that they were about 100 yards in back of the plant and were supposed to stay there so that they could see a shadow in the building of a man moving around in there; that at the time they tied the watchman Lee up it was dark; that he could not possibly recognize a face in the dark; that Grove and Buggy had handkerchiefs over their faces, but that he, the witness, did not. That the reason for taking the stand and making a clean breast of the matter was because of the innocent men involved in it and that he did not think it right not to tell the truth; that the innocent men were Bedell and Cush. Whereupon, the following occurred:

"By Mr. Sirica:

Q. Why didn't you tell that story before today so the officer could get the guilty men you are protecting? A. Well, I didn't care to bear witness against anybody.

Q. You didn't want to tell anything. You were in Headquarters when you were identified and you saw this man Lee pick you and Bedell out of the lineup of five men, didn't you? A. Yes, sir.

Mr. Sirica: That is all."

54 The witness further testified that he was taken to headquarters three times and put in the line-up

twice; that he was not identified the first time, but was identified the second time; that he was present when Bedell was identified; that Bedell was up in front with Officer Talley; that Grove was signing the statements, but that he did not hear any statement made by Bedell. In response to a question by the United States Attorney, the witness testified that he was picked out of a line-up of five or six; that Bedell was alongside of him and that Lee picked them both out; that in the line-up they were behind a screen with a bright light shining on their faces; that he could only get a faint glimpse of the people who were out in front. The witness further testified that since being in jail he has been on the north side of the jail and that the witness Grove has been on the other side; that he did not threaten Grove; that there was no way he could get to him as the witness was continually locked up in a cell. Whereupon the witness testified as follows:

“Q. You heard Grove state on yesterday twice that you had told him to tell the truth about it? A. Yes, sir.

Q. Is that true? A. Well, I told James Grove—I plead with him to tell the truth. I had tears in *his* eyes, and he went up and lied.

Q. Do you remember who tied up the watchman? A. I don't know who tied him up. It was between Buggy and Jim Grove. I left there to get my car.

Mr. Rose: That is all.

By Mr. Sirica:

Q. Did you throw a hammer at Grove in the Breyer Ice Cream Company plant? A. I didn't throw a hammer at anybody.”

55 **James Elam Grove** was called on behalf of the defendant Bedell and testified as follows:

In response to a question as to who had handkerchief over his face on the night of the robbery, the witness testified that Bichert, himself, and Pagliocchini; that there was no fourth man took part in the robbery and that there was no light in the downstairs building at all. In response to questions by the District Attorney, the witness testified that he did not state on a prior occasion that a man by the name of Fox was with them in addition to Bichert; that

what he said about Fox was that there was a man by the name of Fox in the case, but not in Breyer's; that all three of them had masks on their faces; that he also knew Bichert by the name of Buggy; that he is a man about five feet seven inches tall and weighs about 128 or 130 pounds.

William Estes Bedell testified on his own behalf as follows:

That his full name is William Estes Bedell; that on the night of July 26th, he took no part whatever in the theft at the Breyer Ice Cream plant; that he was placed under arrest August 29th; that the first time he saw the witness Lee was in the line-up at Police Headquarters; that he was twice placed in the line-up; that after the second time, Officer Talley informed him that he had been identified; that it is difficult to see the people in the audience at Police Headquarters on account of the bright lights; that he knew that Lee had identified him because of motions he was making to Mr. Allen, the manager of Breyer's, who was present; that Lee was sitting next to Allen and in response to a question, Lee said 'Those two on the end'; that he and

Pagliocchini were next to the end; that Cush was
56 also there; that he later saw Lee in the office of Mr.

Talley in the presence of Mr. Talley and two other detectives; that Talley gave him Grove's statement and asked him to read it; that he thereupon told Officer Talley 'It is a false statement, Mr. Talley'. Whereupon, the following occurred:

"A. Yes, sir. I said, 'It is a false statement'. He said, 'Well, you have been identified'. I says, 'It is mistaken identity'. I turned, and Lee was sitting possibly as far as from me to the railing, and I am sure that I arose, like this (indicating) and I said, 'Uncle, have you ever seen me before?' He says, 'No'. Mr. Talley says, 'Wait a minute'. He says to the colored man, 'You mean that you have never seen him before the night of the robbery?' The colored man said, 'Yes'."

On cross-examination, the witness testified that he had plead guilty and was fined for violations of the liquor law. Whereupon, the following occurred:

"Q. You are also known as Hilton Brunswick Wilson, aren't you? You used to use that name?"

Mr. Whelan: I object. That is utterly improper, I submit, your Honor.

Mr. Sirica: I can show——

Mr. Whelan (interposing): What difference does it make?

The Court: How do I know what difference it makes? I do not see anything improper in it.

Mr. Whelan: We object to the question.

The Court: On what ground?

Mr. Whelan: Why, then, he could ask him if he wasn't known as Jesse James.

The Court: Yes.

Mr. Whelan: The Prosecuting Attorney could ask any questions for their inflammatory effect, but it is improper in law.

The Court: What is your objection?

57 Mr. Whelan: It is improper and irrelevant and does not have any probative force in this case.

The Court: Overruled.

Mr. Whelan: We note an exception.

By Mr. Sirica:

Q. Did you go under the name of Wilson Brunswick? A. I don't remember it.

Q. In 1922?

Mr. Whelan: I object.

By Mr. Sirica:

Q. Did you ever use that name?

Mr. Whelan: Just a moment.

Mr. Sirica: Well, I will say last year.

Mr. Whelan: I move to withdraw a juror because the Prosecuting Attorney is asking the defendant something about a name back in 1922, ten years ago. I submit that it would not make any difference at all, and that the only purpose of it is to prejudice the accused before the jury.

Mr. Sirica: You know that is not the purpose.

The Court: I can see a whole lot of things it might be inquired about for.

Mr. Whelan: Let the Prosecutor state his purpose to your Honor at the bench.

The Court: It seems to me it might have some bearing on his credibility.

Mr. Sirica: I want to find out what his occupation is.

The Court: Objection overruled.

Mr. Whelan: We note an exception."

Whereupon the witness said that he might possibly use that name back in 1922, but that his right name was William
58 Estes Bedell; that in August he rented an apartment under the name of J. B. Walsh. Over objection, the witness testified that his reason for renting the apartment under the name of Walsh was because of his connection with the liquor business. The witness further testified that during the month of August, he was not in the business of buying automobiles; that he wanted to buy an automobile from Pagliocchini; that the reason he wanted to buy from him was because Pagliocchini came to him unsolicited; that Pagliocchini came to him because some friends had told him that the witness wanted to buy a car; that he wanted \$75.00 for the car, and that it was worth about \$150.00. The witness further testified that he saw the automobile, a Chandler roadster; that he did not go around with Pagliocchini after that; that he had only seen him about four times; that the first time he saw him he learned that the car had been stolen and taken to Richmond; that the car had been damaged; and that Pagliocchini had spent money for fixing the car; that he did not buy it because he did not have the money; that the first time he met Pagliocchini was sometime in August; that he had been living in his apartment since the first of July. Whereupon the following occurred:

"Q. Now, did he tell you when he came to you and said he needed money that he had just robbed a safe and that he had gotten over \$300 as his share of the proceeds? A. No, indeed.

Q. He didn't tell you that, did he? A. No, sir.

Q. Did he tell you of any other kind of work he was doing during the month of August when you knew him during that month? A. No. No other work. He claimed that he had just lost some money in some way. He did not explain in what way, but that he had just lost some money that he had."

59 The witness further testified that his connection with William Cush was just sociable acquaintance; that he had know- him during the summer; that he

did not know the witness named Grove; that he saw him in July or August, but did not have any conversation with him; the Witness further testified that he was sometimes known as Bee; that he never had a conversation with Grove, but that Grove had been in his apartment on two occasions with Pagliocchini, but that he could not give the dates; that he was not with these people on July 25th; that from the testimony he knew it was on Monday; that he knew he was in Washington at that time; that between 11 and 12 o'clock that night he was at home; that he first refreshed his recollection on it on the night that Officer Talley read the statement to him on August 31st, a month later; that on July 24th, Sunday night, he was in his apartment and did not remember whom he saw there; that it is possible he saw some people; that he did not know who he saw on the night prior to the Breyer Ice Cream robbery, but might have seen somebody; that on the following night he was home, and that he was home every night during the two weeks following; that he could remember where he was on each particular night for the reason that he was at home; that on the night he was identified Lee picked them out with a wave of his hand; that he was on the end next to Pagliocchini; that Lee said 'The two on the end'; that he did not say anything at the time, but afterwards he asked Officer Talley's permission to speak to Lee; that the reason he waited was being he did not know the rights of the prisoners, but he did say something as soon as he possibly could.

Thereupon, counsel for the defendant rested his case and moved the Court for a directed verdict as to the defendant Bedell, which motion was overruled and an exception noted.

60 **Carlton Talley** was recalled for rebuttal and testified that he was present at Headquarters at the time of the identification; that he did not hear any officer say to the man Lee 'The two men on the end'; that there were five men in the line-up and that he asked Lee if he could identify any of them and that Lee said 'The two men on the end'; that the men were sent out and brought back, and that Lee thereupon went up and picked out Pagliocchini and Bedell. Whereupon, on redirect examination, the following occurred:

“By Mr. Sirica:

Q. Who said anything about ‘Uncle’ then? Did you hear Bedell say anything about ‘Uncle’? A. No, sir.

Q. Did he say anything about, ‘Uncle, you have got me wrong’, or something, while he was in the room with you after? A. Why, afterwards I brought Bedell in the room in the office of the robbery squad, and Lee said that he was one of the men. Bedell said, ‘No’. He said, ‘You evidently have made a mistake, I am not the man’. Asked him when he had seen them, or something to that effect.”

On recross-examination the following occurred:

“By Mr. Whelan:

Q. Isn’t it a fact, Mr. Talley, that for the past week you have been looking for the man whose name is mentioned in this case? A. I have not been looking for the man that has been mentioned in this case. I looked just for the man to come to see me. If I wanted the man I would have went to his home and got him.

Mr. Whelan: That is all.”

Officer Walter S. Beck was called on behalf of the Government and testified in rebuttal as follows: That he was a member of the Metropolitan Police Force assigned to Detective Headquarters; that he was present at Headquarters on August 31, when the witness Lee was
61 present; that he was present at the time the men were brought on the platform for the purpose of identification; that the people were all told before the men were brought in to look them over and not make any statement. Afterwards Lee told Officer Talley that he could identify the two men on the end; that the men were sent out and brought back again, at which time Lee went up and pointed to Pagliocchini and Bedell; that he did not hear Bedell say to Lee ‘Uncle, you have me wrong’; that Bedell was brought into the room where Grove had made a statement, which statement was read to him; that Bedell said that it was a false statement and that at that time Bedell told Lee that he was mistaken in his identity.

Whereupon the Government closed its case and at that point the defendant, Pagliocchini, withdrew his plea of not guilty and entered a plea of guilty.

Whereupon, after argument, the Court charged the jury. Among other things, the Court, in its charge to the jury, made the following statement:

“The COURT (WHEAT, J.): GENTLEMEN OF THE JURY: The indictment in this case charges four defendants, Grove, Cush, Pagliocchini and Bedell, with the crime of house-breaking and larceny, in that they broke into a plant of the Breyer Ice Cream Company and took from there, broke into a safe and took from the safe money in the neighborhood of \$900.

It started out as a very simple case of housebreaking and larceny, the same *was* we try every day, sometimes two or three a day, but as it has developed a number of rather unusual circumstances have come to light.

Before the case was brought to trial defendant Grove pleaded guilty, and since the case has been brought to trial the defendant Pagliocchini has pleaded guilty, and at the close of the Government's case I felt it my duty to discharge the defendant Cush upon the ground that there was
62 no evidence in the case against him. He had not
seen that tended to connect him with the crime had been produced, so that I feel that that was my duty.

It is my duty to caution you that the fact that I will direct a verdict in favor of Cush does not mean that I think the defendant Bedell is guilty. I have no right to think anything about it one way or the other. All I mean is that I think the question is one which under the law should be decided by you and not by me. That is all. My direction of a verdict in favor of Cush carries with it no implication against the defendant Bedell. As to him you must decide the case solely on the evidence which has been produced here.

I think I ought to elaborate a little on the so-called confession of Grove. You remember he was produced on the stand and it appeared that he had signed a paper, and it also appeared that his testimony, testimony which he was about to give, would be in the nature of a repudiation of what was given in that paper, which I held gave the District Attorney the right to treat him as a hostile witness,

that is, to go at him and see if he *would* worm it out of him, as he would at a hostile witness. Without any fault on his part, he failed in that attempt, not any criticism of him. The witness simply laid down on him, that is all, and we cannot help it. He gave no testimony on the stand that implicated anybody in this crime except the defendant Pagliocchini, who has already pleaded guilty. So he is out of it.

Now, the questions which the District Attorney asked and which implied, of course, that Grove had given testimony implicating Bedell, must be disregarded by you entirely. I know you can do it. There is no evidence in this case against Bedell that was given by Grove. There is not any doubt about that. No matter whether he is a liar or a thief or what he is, so far as this case goes he has given no evidence on the stand against the defendant Bedell.

The evidence against Bedell, the only direct evidence against Bedell, is the identification by the old colored man, Lee, I think his name was, and his testimony must be weighed by you very carefully, indeed, to the end that no mistake be made. I will not attempt to go over it all. You heard his testimony. You saw his appearance on the stand. You were able to judge of the condition of his eyesight and his apparent intention to tell the truth or not
63 tell the truth, the evidence of his appearance as indicating his intelligence and his knowledge of what he saw, his ability to state what he saw, his ability to answer questions—all those things were done right before your eyes, and it is for you to consider them very carefully indeed in weighing the evidence which he gave identifying the defendant Bedell as one of the men he saw there that night.

The question of his credibility, the weight to be given to his testimony, is entirely a matter for you to consider and to determine upon.

Pagliocchini gave no evidence against Bedell. The evidence against Bedell, as I say, the only direct evidence, is the evidence as to identification. He took the stand, testified in his own behalf, and thereupon became subject to the rules that govern the testimony of an ordinary witness, whose credibility is for you to decide upon, and in deciding upon that you have a right to take into consideration the fact of his interest in the case, whether that in-

terest tends to color his testimony, causing him to deviate from the truth or conceal anything or tell anything that is not so. That is a matter for you to consider, solely a matter for your consideration, as well as all the other circumstances affecting his credibility.

His admissions that he had been convicted several times of violations of the liquor law is not any proof whatever that he is guilty of this crime. It simply goes to his credibility and may be considered in connection with his credibility, and the weight to be given to it in connection with that credibility is for you to decide, the same as all the other testimony which you might feel tended to affect his credibility.

For instance, the witness Bowen, police officer, testified among other things that, as I recollect it, he denied knowing Grove or Pagliocchini. Well, there is evidence tending to show that Grove and Pagliocchini and Cush lived together at a certain apartment house. Those are mere circumstances tending to affect or having the possibility of affecting one way or the other the credibility of the witness Bedell when he took the stand.

The direct evidence against him is merely the identification. You have on one side the identification, and then on the other side his testimony, and then the weight to be given to his testimony in denial and Lee's testimony
64 in identification.

The fact that Pagliocchini is out of it and Cush is out of it tends to simplify the issue, of course. The only question is as to Bedell now.

In this case, as in all others, the burden is on the Government to prove beyond a reasonable doubt the guilt of the defendant. That burden remains with the Government throughout the case, and until you have found beyond a reasonable doubt that the defendant is guilty that presumption rests. He is presumed to be innocent and presumed to be innocent until he is proven guilty.

The words 'reasonable doubt' must be given their usual, ordinary meaning. The doubt must not be trivial or whimsical or based on groundless conjecture, but it must be one that arises out of the evidence or from the lack of evidence, and one that appears to you to be reasonable in the case. It means a doubt which will leave your minds, after a candid and impartial investigation of all the evi-

dence, so undecided that you are unable to say that you have an abiding conviction of the defendant's guilt, or such doubt as in the graver and more important transactions of life would cause a reasonable and prudent man to hesitate and pause. If, after considering all the evidence, you have that doubt, why, it is your duty to acquit the defendant.

The indictment is in two counts. The first charges housebreaking, the second charges the larceny of the things in the safe. If you find the defendant guilty you can find him guilty of either the first or of the second or both. If you find him not guilty of the first I would say that you would have to find him not guilty of the second, because it would hardly be reasonable if he did not break into the house he would have stolen any of the property that was in there. Or, of course, you can find him not guilty of both.

And as to the defendant Cush I direct you to return a verdict of not guilty.

Is there anything further?

Mr. Whelan: There is one little correction I would suggest to your Honor with reference to the testimony about whether or not Bedell knew Grove and one of the
65 other men your Honor mentioned. My understanding of the testimony was he did not know them by that name, but when he saw them in Headquarters he frankly admitted that he did know them, knew their faces, but told the officers he did not know them by name.

The Court: Well, it is a slight circumstance, anyway.

Mr. Whelan: Yes.

The Court: And if that is your recollection of the evidence, why then your recollection must prevail. In fact, in regard to the evidence you are the judges of what the evidence is, not my recollection of it but your own recollection. The substantial evidence against him is the identification and that is all. The rest, in so far as it goes, may or may not in some degree tend to corroborate that identification, and that is for you to say, whether it does or does not.

Anything further?

Mr. Whelan: That is all.

The Court: So you may retire, and remember the verdict must be not guilty as to Cush. As to the defendant Bedell

you can find him guilty of both counts, or not guilty of both counts, or you can find him guilty of the first and not of the second, but if you find him not guilty of the first I would say you would have to find him not guilty of the second.

You may retire now."

* * * * *

A verdict of guilty as charged was returned by the jury, and counsel for this defendant gave timely and appropriate notice of his intention to apply to the Court of Appeals for a Writ of Error.

And the Court hereby certifies that the foregoing is a substance of the evidence upon the questions to which exceptions were duly noted, upon which the jury rendered a verdict of guilty.

This defendant now tenders this, his Amended Bill of Exceptions herein, and prays that the same be
66 signed and sealed, and enrolled and made a part of the record in this case, nunc pro tunc, this 28 day of April, A. D. 1933, which is accordingly done.

ALFRED A. WHEAT,
Chief Justice.

The foregoing Amended Bill of Exceptions is approved.

UNITED STATES ATTORNEY,
By JOHN J. SIRICA,
His Assistant.

HARRY T. WHELAN,
Attorney for Bedell.

67 [Endorsed:] Number 52334. United States of America v. William E. Bedell. Amended bill of exceptions. Whelan & O'Connell, Attorneys, 610 Columbian Bldg. District 6666.

Endorsed on cover: District of Columbia Supreme Court. No. 5973. William E. Bedell, appellant, vs. United States. Court of Appeals, District of Columbia. Filed Jun. 5, 1933. Henry W. Hodges, Clerk.

OCT 19 1933

Harry H. Smith
CLERK

IN THE
**Court of Appeals of the
District of Columbia**

APRIL TERM, 1933

No. 5973

Special Calendar

WILLIAM E. BEDELL, *Appellant*

vs.

UNITED STATES

APPELLANT'S BRIEF

HARRY T. WHELAN,

WILLIAM B. O'CONNELL,

Attorneys for Appellant.

INDEX

	Page
Statement of the Case	1
Assignment of Errors	47
Argument	48
Conclusion	59

CITATIONS

Kuhn v. United States, 24 Fed. (2d) 910	49
Sneed v. United States, 298 Fed. 911	50
Sullivan v. United States, 28 Fed. (2d) 147	51
Hickory v. United States, 151 U. S. 303	53
Putnam v. United States, 162 U. S. 687	54
Moore v. United States, 150 U. S. 57	54
State vs. Wolfe, 70 A. L. R. 1039	54
St. Clair v. United States, 154 U. S. 134	54
Ruppert v. Wolf, 4 Appeals D. C. 556	55
Hicks v. United States, 150 U. S. 442	56
Egan v. United States, 52 Appeals D. C. 384	56
United States vs. Sager, 49 Fed. (2d) 725	59

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

On the night of the 26th of July, 1932, the warehouse of the Breyer Ice Cream Company, a corporation in the District of Columbia, located at 1830 East Bladensburg Road, Northeast, in the District of Columbia,

was entered and the safe in the office broken into, from which was taken approximately nine hundred dollars in money and a number of postage stamps. On the 28th of August following, Joseph F. Bowers, a police officer, discovered an automobile on Tenth Street, Southeast, between L and M Streets, in which he found some tools, consisting of punches and some chisels. On investigation, he found that this car belonged to one James E. Grove, and he, in company with other officers, went to the home of James E. Grove at Capitol Heights, Maryland, and arrested the said Grove, together with one Pagliocchini. As a result of information they obtained from Grove, they went to the Southern Apartments, where they arrested the defendants, Bedell, appellant herein, and Cush.

The defendant, Grove, made a signed statement to the police officers at the time, in which he admitted that he had been one of the men who robbed the Breyer Ice Cream Company's plant, and further told the officers, in his signed statement, that Pagliocchini, Bedell, and Cush also took part in this burglary. He, Grove, told the officers that he, with the other, had planned this robbery some time in advance, and on the night it took place had gone to the plant and watched it. They knew that there would be a watchman in the place shortly after midnight; that one nightman left about a quarter to twelve and the other nightman would come on at about a quarter after twelve. That, with this information, they waited near the premises until the first watchman had gone away, and thereupon broke a window and made their entrance

and waited for the second watchman to come. When the second watchman came, he was seized and held by one of the men while the other two went upstairs and broke open the safe; that upon leaving, the last watchman, who was a man named Lee, was tied up and left in this condition until he was discovered by the police in the morning.

After the arrest of the four men, they were taken to police headquarters, and the defendants, Cush, Bedell and Pagliocchini placed in a line-up for the purpose of giving the watchman, Lee, a chance to identify them. The first time Lee looked at the men, he was unable to identify anyone: on the second occasion, he identified Pagliocchini, and the appellant, Bedell; after this identification, when Bedell was informed that he had been identified, he, Bedell, immediately asked permission to speak to the watchman, Lee, and asked him whether or not he had ever seen him before, to which Lee said 'No', but on being prompted by a police officer, the witness Lee said that he meant that he had never seen him before the night of the robbery. Bedell was then informed that Grove had made a written statement, in which he implicated him in the robbery and the statement was read to him, as well also as to Pagliocchini. At the time, Bedell stated that it was a false statement and that he did not have anything whatsoever to do with the robbery. The defendants were all indicted for this robbery and the defendant, Grove, plead guilty. The case was called for trial on the 29th of November, 1932, with Bedell, Pagliocchini and Cush as defendants. After calling witnesses from the

Breyer Ice Cream Company for the purpose of identifying the time and place of the robbery, the United States Attorney called as his first witness JAMES ELAM GROVE who testified that he had been a defendant in this case, but had previously entered a plea of guilty to this charge, as well also as a plea of guilty to two other charges of housebreaking and larceny: that he knew the three defendants, Cush, Pagliocchini and Bedell, and identified each: that he knew Cush by the name of 'Doc', Bedell by the name of 'Bee', and Pagliocchini by the name of 'Mussolini'. When asked whether or not he saw the defendants on Monday night, July 25th, 1932, he replied "No": that he did not see them anywhere that night and did not go anywhere with them that night. Thereupon, Mr. Sirica, Assistant United States Attorney on behalf of the Government, announced that he was surprised and asked leave to cross-examine the witness. Whereupon the following occurred out of the hearing of the jury:

"Mr. Kelly: Your Honor, I have been informed that this man on at least one occasion told Mr. Collins of the District Attorney's Office that these boys sitting over here had nothing to do with the matter. I understand that he also made a statement in which he involved them. So I do not see how the Government can now announce surprise, if the witness has previously made contradictory statements, has made this statement on at least one other occasion in the District Attorney's Office. If he makes such a statement in the District Attorney's Office and then comes here and makes the statement, I do not see how the District Attorney can say that he is taken by surprise by what the witness says here in Court.

“Mr. Sirica: Your Honor, as Mr. Kelly has said, this witness did deny on one or two occasions what he had first said to the police. Mr. Kelly was advised of that. But on November 18th, he was brought up to the grand Jury room, in the presence of his father, Detective Talley, Detective Bowers, and one or two others, and we handed to him the statement that he had made to the police on August 31st, asked him to read it and every line of it, and he read it through, and at that time I asked ‘Grove, is that a true statement?’ He said, ‘Yes, it is a true statement’. And that is the statement we are relying on now as his testimony. And on his testimony just given here we announced surprise because of the attitude of the witness in not sticking to that statement.

“The Court: Gentlemen of counsel for the defendants, I do not think there is any doubt about the matter.

“Mr. Sirica: And, your Honor, I can show you two cases decided by the Court of Appeals if you want to see them.

“The Court: I think where a witness tells one story one day and another story another day, and then comes forward and confirms the first story, that counsel putting the witness on the stand may claim surprise and have the privilege of cross-examining him.

“Mr. Kelly: I don’t see how Government counsel can announce that he is taken by surprise when this witness has already denied that written statement.

“Mr. Sirica: We do announce surprise and contend that we are taken by surprise.

“Mr. Kelly: I understand that you announce it, but I contend that the only instance wherein the Govern-

ment can announce surprise is where a witness has made a statement and then has repudiated it. But where a witness has heretofore made conflicting statements, has said one time one thing and another time another thing, and on a couple of occasions has said these defendants had nothing to do with it, and on other occasions has said they did, I don't see how the Government can be taken by surprise.

“Mr. Sirica: We are going to the trial of the case on what he said within a week or two up at the grand jury room.

“Mr. Kelly: Yes, but this is going to the jury.

“The Court: It is all up to the jury.

“Mr. Sirica: I have the right to cross-examine on whichever statement he made.

“Mr. Kelly: We wish to note an exception, if your Honor please.

“The Court: All right. Let the exception be noted.

* * * * *

“Mr. Whelan: On this question, if your Honor please, I understand now that the District Attorney seeks to cross-examine the witness he has produced and placed on the stand.

“Mr. Sirica: Yes.

“Mr. Whelan: I want to advise the Court at this time that my information is this particular witness plead guilty, that he has attorneys, that he has told his attorneys that he has made false statements and wants to correct them, that they have worried him. If

that is so, and if this witness has an attorney—and I don't know whether that attorney has advised the United States Attorney's Office of that fact or not—but if that attorney has advised the United States Attorney's office, then most certainly they could not be taken by surprise and should not have the right to cross-examine this witness. So I am going to ask your Honor this: This is a very unusual situation, that is presented here in this case. All of us, the District Attorneys, counsel for defendants, have been disturbed about this matter. I would ask that the jury be excluded now, and that your Honor get the attorney for this man here, and that your Honor yourself question this witness. He is a young boy, and he has made pro and con statements about this same thing. I understand he has told the District Attorney that he did not tell the truth at the beginning, and we feel that the situation is such we should appeal to the Court for some assistance for fear there may be a miscarriage of justice one way or the other.

“Mr. Sirica: I expect to cross-examine this defendant, if permitted to do so, on the reasons why he is not testifying now according to his signed statement, and I expect to examine him on certain threats that have been made to him at different times to show why he is not now so testifying.

“The Court: I think it will have to go to the jury. I do not think you counsel for defendants are presenting a question that has not arisen before.

“Mr. Sirica: Oh, no, if your Honor please, and if it were necessary I could present some cases on the point.

“Mr. Whelan: Yes, if taken by surprise, but I do

not think you are in fact taken by surprise when the boy has already heretofore denied that statement.

“Mr. Sirica: The last time I saw him he told us that the statement was true. And that is what we are now going to trial on.

“The Court: Logically it is a surprise if he goes back on what he has said.

“Mr. Kelly: But that is not the test in this situation. He has made different statements, conflicting statements, and of course in that event if one is true the other is not.

“The Court: What you are trying to do is to prevent this story from coming out. Now, it is not a question to be unduly technical on. *The District Attorney expected this man to testify that he was there that night, and when seated in the witness chair, and I could see him, and you could see him, how he hesitated, and swallowed hard two or three times, and finally mumbled something. Now, if that is not a case where the truth should be brought out if it can be brought out, I don't know.*

“Mr. Kelly: I respectfully submit for your Honor, because your Honor has made a ruling on the question of surprise, and quite naturally we bow to your ruling, but with respect to any testimony that he might give, if it went in, we submit it would not be proof of anything. In other words, it would not be proof if Mr. Sirica asked, ‘Didn't you make this statement?’ and should he admit it or deny it, I say that is not evidence before the jury as to that. As I understand the situation the only purpose for which your Honor is permitting the cross-examination of the witness is that Mr. Sirica has announced surprise and it is to affect his credibility

as a witness. The witness has not said anything yet.

“Mr. Sirica: I am not bound by the statement he makes. That is another reason.

“Mr. Whelan: That is a technical reason. Your Honor, I should like to find out the practical truth of the matter. I should like to have your Honor excuse the jury and yourself take hold of the examination of this witness.

“The Court: It is not up to me to find out the truth in that way when counsel are examining the witness.

“Mr. Whelan: No, to find out whether counsel for the Government has been taken by surprise. Let your Honor determine that after talking to the witness, which is a legal question after all.

“Mr. Sirica: I expect to cross-examine the witness on that point. I will bring that out.

“The Court: The object of a trial is to ascertain the truth. Ordinarily a witness is put on the stand by one of the parties, and he is supposed to have been examined beforehand and to have told a certain story, and examining counsel are supposed to be familiar with what he is going to put forth. In a general way he vouches for his general credibility. But it is not a hard and fast rule when a situation develops where the truth requires that counsel may cross-examine the witness. That is my experience.

* * * * *

“The Court: It is for the jury and not for me. You cannot make me believe that when a witness like this one sits there in the witness chair, and shows his emo-

tions, and he is a poor weakling for you can see that; when he sits there and acts like he does, that the District Attorney must be helpless, and when a verdict for the defendant has to be directed.

“Mr. Kelly: We do not request that.

“The Court: No. But what you request now is that I forbid the District Attorney to cross-examine this witness. I wil not do it, gentlemen.

“Mr. Whelan: Now, I ask your Honor, and it is a judicial question, the question of surprise, and is solely for your Honor; I ask your Honor to take hold of this witness and tell him he is under the protection of this court and that you want the truth, and that your Honor will see whether or not the District Attorney is taken by surprise before you permit cross-questions to be put to the witness.

“The Court: Instead of asking the witness if he is taken by surprise I will take Mr. Sirica’s statement for it.

“Mr. Sirica: I announced that I was taken by surprise by the last statement that the witness made. That is all that I can possibly do in the case.

“The Court: I will permit you to cross-examine the witness, Mr. Sirica.”

* * * * *

Thereupon, the witness was handed a piece of paper, purporting to be a statement made by him to the police at the time of his arrest, which he identified. He testi-

fied that the statement was made at police headquarters to Detective Talley. That on November 18th, 1932, he was brought to the Grand Jury Room by a United State Marshal and, in the presence of Police Officer Talley, Assistant United States Attorneys Collins and Sirica, and some others, the witness was handed the piece of paper and was asked if the statements were true, and that he replied at that time that they were true. Thereupon, the following occurred:

Q. Now, I am going to ask you a few questions on this. Starting off it says:

‘Statement of James Elam Grove relative to house-breaking at the Breyer’s Ice Cream Company, 1830 Bladensburg Road, Northeast, at or about 1 a. m., July 26, 1932.’

That statement was made originally on August 31, 1932, in the office of the robbery squad of the Detective Bureau, is that right? A. Yes, sir.

Q. Then it goes on:

‘I, James Elam Grove, after being advised as to my legal rights, that I am not compelled to make a statement in reference to the above housebreaking, and after being told that any statement that I would make, would be used against me in court, do hereby make the following statement, of my own free will, without duress or promise of any favor shown me.

‘Questioned by Detective Sergeant Carlton Talley:

‘Question. Are you willing to make a statement?
Answer. Yes.

‘Question. Now tell us in your own way and language what you know about this housebreaking.’

Mr. Kelly: If your Honor please, so that I may not interrupt counsel at various times in making objections, I now on behalf of the defendant Cush, following out what I said to your Honor when at the bench, desire to object to this particular method of cross-examination of the witness, on the ground that this is an indirect way of reading before the jury of a statement not made in the presence of the defendants, and particularly the defendant for whom I appear, and therefore could not be binding upon him. I therefore object to the reading by Mr. Sirica of anything contained in that statement on the ground that it was a statement made out of his presence and that he had no opportunity to object to it.

Mr. Sirica: This statement was read over in the presence of Cush, Bedell, and Pagliocchini, and the three defendants named denied the statements made by this witness.

Mr. Kelly: Then for the additional reason stated by Mr. Sirica, that at the time the defendant Cush denied the truth of it, I object.

Mr. Sirica: I am not offering it against them.

The Court: The statement up to the present time is not evidence against anybody except Grove.

“Mr. Kelly: I appreciate that, and that is the reason I had not objected to it up to the time where he was asked to tell something about some housebreaking.

The Court: *I assume he is going to bring out from the statement facts which, if true, would incriminate the other defendants. It is not evidence as to them at this stage of the case. What will happen later I do not at this time know.*

Mr. Kelly: It it is not evidence as to them I object. This defendant Grove is not here on trial having already pleaded guilty.

Mr. Sirica: I have already stated that I am taken by surprise by the answer of the witness, and I now want to cross-examine him about each statement made here in this paper.

Mr. Whelan: Hasn't that statement been identified sufficiently as to time and place and occasion for you now to ask the witness if he did make such a statement.

Mr. Sirica: I think I asked that.

Mr. Whelan: He said that was his signature. It is sufficiently identified now. So why not ask him if he made the statement?

Mr. Sirica: May I proceed, your Honor?

The Court: Yes.

By Mr. Sirica:

Q. Grove, do you remember a little over a week ago, November 18, 1932, to be exact, during the afternoon you were brought up in the grand jury room by a Deputy United States Marshal? A. Yes.

Q. And I handed you this particular piece of paper and asked you to read every bit of it? A. Yes, sir.

Q. And you read it over, and I then asked you if you had read it? A. Yes, sir.

Q. I asked you if the statements contained therein were the truth and you said it was the truth on that occasion, did you not? A. Yes.

Q. Yes, Grove, didn't you make this statement: 'About 7 o'clock p. m.'—and, by the way, this is what you read over in the grand jury room, is it not? A. Yes, sir.

Q. Didn't you make this statement: 'About 7 o'clock p. m. July 25th, I met August Pagliocchini alias Mussolini, William Francis Cush, alias Doc, and William Estes Bedell, alias Walsh, on Pennsylvania Avenue between Sixth and Seventh Street, Northwest'. I will ask you if you did not make that statement? A. Yes.

Q. And that is true, isn't it? A. No.

Q. That is not true? A. No.

Mr. Whelan: Now, if your Honor please, the witness evidently knows, and he says that statement was made, and then he tells what it is. Why ask him if he made the complete statement.

Mr. Sirica: I submit that I have a right to ask him about the entire statement, line by line.

Mr. Whelan: Your Honor, Mr. Sirica is trying to get it before the jury.

The Court: We might disagree perhaps about what his object is, but I will overrule the objection.

Mr. Whelan: We note an exception.

Mr. Kelly: We note an exception.

Mr. Rose: We also note an exception.

By Mr. Sirica:

Q. Grove, didn't you make this statement?: 'Mussolini said he has been watching the Breyer Ice Cream Building for about a week, and that a man stayed there until midnight, and after midnight there was no one in there'. You made that statement, didn't you? A. Yes.

Q. Was that true or not? A. That is true.

Q. All right. And didn't you make this statement: 'He said it was an easy job, and Bedell said he would take it'. You made that statement, didn't you? A. Yes.

Q. Was that true or not? A. No.

Q. You made this statement, didn't you: 'We stayed together the rest of the evening, riding around in a Buick roadster driven by Bedell.' That is the truth, isn't it? A. No.

Q. And didn't you state: 'We went to Glenburnie, Maryland, and got back to Sixth and Pennsylvania Avenue, Southeast, about 11:45 p. m., This is true, isn't it? A. No.

Q. And you stated, didn't you: 'I got my Dodge car and drove to Fifteenth Street, between L and M Streets, Northwest, where I parked.' That is true, isn't it? A. No.

Q. And didn't you state: 'Bedell followed me in the Buick, and I then got in the Buick and we drove to the alley in the back of Bedell's apartment in the Southern Apartments.' That was true, wasn't it? A. No.

Q. You made that statement to the police, didn't you? A. Yes, sir.

Q. And didn't you state: 'Bedell went into the building and came out with a burlap bag containing tools.' That is true isn't it? A. No.

Q. Did you make that statement to the police? A. Yes, sir.

Q. And then you said, didn't you: 'We then went to New York Avenue near Bladensburg Road near the Breyer plant, and parked the car.' This is true, isn't it? A. No.

Q. Who went there? A. It was myself and Pagliocchini and two other fellows.

Q. This is the statement that you gave to the police, that is right isn't it? A. Yes, sir.

By the Court:

Q. Who was it that you said went there? A. Myself and two other fellows and Pagliocchini.

By Mr. Sirica:

Q. And didn't you state: 'I got out and went over in a field to act as lookout.' That is true, isn't it? A. Yes, sir.

Q. And didn't you state: 'Mussolini was to stay by a window and watch for my signal.' That is true, isn't it? A. Yes, sir.

Q. And you said: 'Bedell, Cush and Mussolini entered the building through a side window.' That is true, isn't it? A. No.

Q. And you said, didn't you: 'After they were in about thirty minutes or forty minutes they came out and got into the car and picked me up on the Bladensburg Road about 500 feet from the Breyer building.' That is true, isn't it? A. I was picked up on the Bladensburg Road, but not by Bedell and Cush.

Q. By whom? A. By Pagliocchini and another fellow.

Q. And didn't you state: 'They drove back to the alley in back of the Southern Apartments and Bedell and Cush went upstairs.' That is right, isn't it? You had been to the Southern Apartments? A. I had been there a couple of times.

Q. And you know that Bedell lives there? A. Yes, sir.

Q. And you know that he lives there under the name of Walsh? A. No.

Q. What name did you know him under. A. Bedell.

Mr. Whelan: Are those matters in the statement?

Mr. Sirica: No. I will withdraw that.

Mr. Whelan: We ask that it be withdrawn.

The Court: Very well.

By Mr. Sirica:

Q. You said, didn't you: 'They drove back to the alley in back of the Southern Apartments and Bedell and Cush went upstairs, while Mussolini and I parked the car on M Street.' That is true, isn't it? A. No.

Q. And you said, didn't you: 'Mussolini and I came back and met Cush in front of the Southern Apartments and he handed be between \$10 and \$20.' That is true, isn't it? A. No.

Q. Who handed it to you? A. Pagliocchini gave me between \$10 and \$20, but not there.

Q. And you said, didn't you: 'After he handed me the money Mussolini said he would be seeing me, and I left him and Doc there.' That is right, isn't it? A. No.

Q. You know this man Cush by the name of Doc. didn't you? A. Yes, sir.

Q. That is the name you knew Cush by? A. Yes, sir.

Q. And you said, didn't you: 'I went and got my car, which was Parked on Fifteenth Street between L and M Streets, Northwest, and drove to my house at 510 D Street, Southeast.' That is right, isn't it? A. No.

Q. You didn't do that? A. No."

* * * * *

The witness denied that he had on one or two occasions been threatened. He admitted that he testified in the police court at the preliminary hearing against the same man, and that at that time he told the same story that was detailed in the statement, which he had signed, and that he told the United States Attorney at that time that that statement was true. That prior to testifying, he sent word to the United States Attorney that he was not going to testify: that when the District Attorney learned this, he called for Detective Talley and asked the witness what was the matter and the witness said that he was afraid; that 'Mussolini' had called him over while they were down in the dock and told him that he might find himself in the gutter if he told that story: that Mussolini asked him when he got on the stand to tell the truth, but that he did not tell the truth; that when he got on the stand he put Bedell's and Cush's name in it. When asked at the trial of this case who the others were, he said Fox and Beichert; that he mentioned their names before and that he had known Fox for two years and Beichert ever since he had been in 'this racket', and that he saw these two men on the night of July 26th. When asked why he put Bedell and Cush in their places, if they had nothing to do with it, he said for the simple reason that on the night of the Earnshaw job, nobody knew he had any tools in his car except Bedell. His car was taken away from in front of his house that night and he suspected Bedell of being the one who had taken his car. That the reason, in replying to a question by the Court as to why he put Bedell and Cush in the statement, he said

“Well, I put them two in the statement to shield the other two boys.” The witness then testified in response to a question by Mr. Sirica as follows:

“Q. That is the first time you have given their names out? A. Yes.

Q. That is right, that is the first time? A. Yes.

Q. I believe, when you were brought to Headquarters, you freely admitted everything, in the presence of Talley, and your father: that is right, isn't it? A. Yes, sir.

Q. Is that right? A. Yes.

Q. When you made the statement in Headquarters, your father was present, and your father told you to tell the truth, didn't he? A. Yes.

Q. And you did tell the truth, didn't you? A. No.

Q. How did you happen to think about Bedell and Cush at that particular time? A. Well, I was in No. 4 Precinct—I was locked up there several hours, then I was taken to Headquarters, and when Officer Bowers told me that my car was on 10th Street, Southeast, and they had found tools in it pertaining to the Earnshaw job, I figured that Bedell and some of his friends were the only ones that done it, taken my car and went there.

Q. Is that all?

Mr. Whelan: If your Honor please, if that is the reason why he used Bedell's and Cush's names in this statement, that he used their names—his reason is not stated; I think we should have it.

The Court: Nobody is objecting.

By Mr. Whelan:

Q. Was that your reason, you thought they had taken your car, and that is the reason you put their

names in here, instead of Bichert and Fox; is that right? A. Yes.

By Mr. Sirica:

Q. Grove, you have been with Bedell in a Buick roadster, haven't you? A. No, sir.

Q. Never seen him in a Buick roadster? A. I have seen him in a Buick roadster.

Q. And you told Officer Bowers in this statement about Bedell and Cush being mixed up in it, didn't you? You gave him the information about Cush and Bedell? A. I told him about Bedell.

Q. And you didn't call him Cush; you called him Doc? A. Yes.

Q. And it wasn't until they put him in front of you that you knew he wasn't Doc? A. Yes, sir.

Q. And you knew Pagliocchini as Mussolini? A. Yes.

Q. How many times have you been in Bedell's apartment house at 15th and M Streets? A. Twice.

Mr. Whelan: I object.

Mr. Sirica: I can show that.

Mr. Whelan: This was a question of surprise. This witness said he made that statement, and it wasn't true. That is the end of this surprise.

Mr. Sirica: I think I can bring out—I will drop that, the reasons which might prompt him to deny that statement at this time. I won't press the other point.

By Mr. Sirica:

Q. Now do you remember this other occasion, up in the grand jury room last week, when you read the statement over, and you said it was the truth, and we asked you what you were afraid of, is that right? A. Yes.

Q. And you said, 'Why, you can't tell what a fellow like Bedell will do if I tell something about him, you will be found in the gutter with a slug in your back' Did you say that upstairs? A. No.

Q. You deny you made that statement upstairs? A. Yes.

Q. All right. You deny that? A. Yes.

Q. One other thing. We talked up there for a while, and you said that you were afraid of Bedell and Cush, or those boys you were going to testify against, didn't you? You were afraid of them, weren't you? A. A little, yes.

Q. A little? A. Yes.

Q. Why were you afraid of Bedell? A. I wasn't particularly afraid of Bedell. I was more afraid, particularly afraid of Pagliocchini.

Q. You had always put Pagliocchini in the picture? A. Yes, sir.

Q. You remember telling us upstairs, 'It is all right for you prosecutors, but how would you like to wake up in your cell and find a 3-inch blade knife there? Wouldn't you think before you testify?' A. Yes.

Q. Didn't you make that statement? A. Yes.

Q. And you did find—that is all."

* * * * *

On cross-examination, the witness testified that on July 25th, he met Pagliocchini and Beichert at his house at 510 D Street, Southeast; that they all got in the car and rode around until 11:30. Pagliocchini told him that they had all been watching the Breyer Ice Cream Company plant and that there was a man there until a quarter to twelve, at which time he left and another one came on at about a quarter after twelve. That they decided to rob the place: that they went to Beichert's house and got the tools and from there they went back to New York Avenue in back of the Breyer Ice Cream Company and parked: that they went across the field in back of the plant and then went up and broke one of the side windows, unlocked the door and went in. That they waited for the watchman and when the watchman came in Pagliocchini and Beichert held him off with the gun while the witness tied his hands with a piece of wire: that the other two went upstairs while he was supposed to watch the watchman: that when they completed the job, Beichert went and got the automobile and they met him about five hundred feet from the plant on Bladensburg Road and started to town. The witness further testified that about three weeks prior to the date of the trial, a man came down to the jail where he had been since his arrest and made a speech about putting innocent people in jail, and he thereupon sent a note to Bedell asking Bedell to have his attorney interview him. As a result, one of Bedell's attorneys came down to see him and he told the truth to the attorney about the entire matter, and told the attorney that while he had not been promised anything when he made the statement to the police, his reason for putting Cush and Bedell into

the picture was because he thought Bedell had used his car and that he was trying to protect Beichert and Fox. At this point, a colored man by the name of Lee, a watchman at the Breyer Ice Cream Company, was brought into the room and the witness identified him as the watchman he had tied up on the night of the robbery. When asked who had threatened him, the witness said "I was threatened in the bull pen in the police court, Pagliocchini says to me, he says, 'Jimmy, if I was you, when I got up on this stand here, I would tell the truth about this thing'", and that is what he meant when he said that he had been threatened. The witness further testified that Bedell had never threatened him and that he had never talked to him about the matter. That he had sent word to the District Attorney's Office that he wanted to tell the truth about the entire matter, but had never been given an opportunity to set down and tell the truth about it. That when he was called to the United States Attorney's Office, he was handed a statement but did not read it, but told Mr. Collins that everything in it was true. However, he further said that five minutes later, he came back and told Mr. Collins that these statements were not true, which was said in the presence of both Mr. Collins and Mr. Sirica, and when asked to name the two men who were with him, the witness said that he did not answer that question one way or the other, and that his reason for naming the two men now was that he did not want to put two innocent men in rather than the ones who were guilty.

Thereupon, Herbert Lee was called to the witness stand and testified that he was employed by the Breyer

Ice Cream Company to clean up the rooms and the garage, and on the night of July 26, at about one o'clock in the morning, when he went in, three men ran up, turned guns on him, and grabbed him. He identified, at this point, the defendants Bedell and Pagliocchini as two of the men. He further said that the two men he identified were working on the safe upstairs: that while they were working upstairs, he rattled some cans, and they carried him down on the running board of a machine and tied him up with some wire: that he was tied up for four hours, until a policeman came and let him loose. That *two or three days later*, he went to headquarters where he identified two men: that on the first occasion he did not see them, but he saw them on the second occasion: that they were in a line-up with five men. On cross-examination, the witness testified that he was seventy years old; that there was no light in the place and that it was dark and the only way you could see was from a light in the street, and you could see the men when they came in the light, at which time he could see them well. That one did not have a cap on, but had a handkerchief over his face, but that he could not tell which one had the handkerchief over his face. That the shortest one had a cap on, but he could not tell the color of it, and he could not identify the third man because he stayed in the dark, but that he was positive about the other two, although it was the only time he saw the men except at police headquarters. That at police headquarters, one of the men said to him "Uncle, have you seen me before", and he told him that he had not seen him before that night: that he was prompted by a police officer and said that he meant the night of the robbery. He testified that five men were placed before him on two occasions and that they were

the same men; that he did not identify the two men on the first occasion, but did identify them on the second occasion.

Whereupon, the following occurred:

“Q. Let me ask you: The first time, how many men were put up? A. Two.

Q. And you didn't identify those two? A. No, sir.

Q. How many were put up the next time. A. Five.

Q. Now were the two in the crowd of five? A. Yes, sir.

Q. Now, I mean, the same men that you didn't identify, were placed in the line the second time? A. No; they wasn't in the line at all.

Q. Then those were five new faces in the line after the first time? A. Yes, sir.

Q. And it was then you picked them out? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now did you talk to anybody before you picked out those people? A. No, sir; I didn't talk to a soul.

Q. While you were down there—— A. No, sir.

Q. You were down there, I say? A. Yes, sir.

Q. How long were you there? A. About a couple hours.

Q. Those men were put right under a big light at Headquarters? A. Yes, sir.

Q. You could see them very plainly? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Mr. Whelan: May I have, if the Court please, Mr. Grove step up a moment?

By Mr. Whelan:

Q. You can see pretty well, Mr. Lee, can't you? A. Not so good.

Q. Can you look up at the clock? Can you see a clock in the court room? A. Yes, sir.

Q. Can you tell the time. A. Twenty minutes to 3.

Q. Twenty minutes to 3?

By the Court:

Q. What time did you say it was; what time by the clock? A. A quarter to 3."

* * * * *

Thereupon, the witness Grove was called into the court room and the witness Lee asked if he had seen him before, and he said that he had seen him on the morning of the trial, but had not seen him on the night of the robbery. That there was someone at the robbery that might have been a little taller than Grove: that the two men who broke the safe open were about the same height; that he only saw three and that the third man was about as tall as Grove, but he did not know whether or not he looked like Grove, because he stayed in the dark.

Thereupon, MRS. LOTTIE L. BOONE was called as a witness and testified that she was the manager of the Southern Apartment House at 15th and M Streets; that she recognized the three defendants, but was not positive about Grove, and that the defendant Bedell

had rented the apartment under the name of J. B. Walsh, according to the records of the apartment, which he kept until August 22nd: that during that time she saw the three defendants in the apartment.

RAYMOND BUNN was called as a witness and testified that he operated an elevator at the Southern Apartments during the month of July and August: That Bedell had an apartment there during that time, and he thought he saw the three defendants going up and down the elevator, but was not sure about the witness Grove.

Police officer JOSEPH F. BOWERS was called as a witness and testified that on the 28th of August he saw a Dodge automobile at Tenth Street, between L and M Streets, in the rear of Earnshaw's warehouse, with some tools in it, including some punches and chisels. As a result of his investigation, he learned that the car was loaned to James Grove whom he located at Capitol Heights, with the defendant Pagliocchini, where he placed them under arrest. That as a result of information obtained from Grove, he arrested Bedell and Cush the following day in front of the Southern Apartments: that the latter two at that time denied knowing Grove or Pagliocchini until they saw them when they admitted that they knew Grove by the name of 'Jim', but did not know his last name. He further testified that he talked to Bedell and Cush on several occasions and at all times they denied any connection with the robbery: that Bedell was placed in the line-up in police headquarters on two occasions and on one occasion the witness Lee identified him, but that he did not remember Bedell asking Lee the question whether or not he

had seen him before, although he did remember that Bedell had cautioned the witness Lee about the identification.

CARLTON TALLEY was called as a witness and testified that he was a member of the Metropolitan Police Force and was present when James Grove made his statement at police headquarters, and was present on November 18th at the time Grove was brought to the Grand Jury Room, and his statement read over to him at which time Grove stated that it was true. He further stated that Grove said, in reply to a question, that he was afraid of this bunch and made the remark "Why, you don't know what this cokehead, Bedell, would say if he got out of jail, or I got out". The officer testified that he was present when the men were put in the line-up at headquarters, but so far as he knew Bedell was only put in there once. Lee was there and identified him, and that he heard the conversation between Lee and Bedell afterwards, at which time Bedell told Lee that he had made a mistake: that he did not recall that Bedell referred to Lee as 'uncle' or had asked him whether or not he had seen him before. The officer further testified that Grove did not tell him about Beichert or Fox, although he knew Beichert and knew that he was involved in a safe robbery. However, he did not know the man Fox.

JAMES F. GROVE was then called and testified that he was a member of the District of Columbia Park Police and the father of the witness, James Elam Grove. Whereupon, the following took place:

“Q. Now do you remember an occasion in the grand jury room on November 18, about a week ago——

Mr. Kelly: If your Honor please, at this time I want to object. I think we have a good picture of what occurred in the grand jury room.

Mr. Sirica: We have a right to show everything that occurred there.

The Court: I am not sure about that. The only thing about that statement, it is evidence against him.

Mr. Sirica: The thing is this: Grove made a statement up there that certain threats were made in the grand jury room. The only purpose of showing this was to show that those statements were made by him in our presence.

Mr. Kelly: Talley has already testified to it.

Mr. Sirica: I don't want to be put in the position of them saying we didn't prove it.

The Court: I don't think they can comment on that. It is purely a collateral matter.

Mr. Sirica: That is correct.

The Court: I doubt that you can, against objection, put everything that took place.

That is all.”

Whereupon MR. WILLIAM H. COLLINS was called as a witness on behalf of the Government and testified as follows:

That he is Assistant United States Attorney and had been for seven years; that he knew the defendant,

Grove. Whereupon the following occurred in the presence of the jury:

“Q. Do you remember an occasion a short while ago, when Grove was up in our offices, and you talked with him with reference to statements he had made in this case? A. I do.

Q. What, if anything, did he say on the first occasion when he was brought up, when I was present?

Mr. Kelly: We object. He has already admitted that he made the statement to Mr. Collins.

Mr. Sirica: Well, he has denied that he made certain other statements up there.

The Court: Now, let us see where we are. He was put on the stand and shown his statement—No; he was put on the stand first and asked questions.

Mr. Sirica: That is right.

The Court: As a result of his answer to that question, I permitted you to examine him as a hostile witness.

Mr. Sirica: That is correct, your Honor.

The Court: Now in the course of that examination, he admitted that he had made the statement, and he gave certain answers and also went on and told things that were in it that were not true.

Mr. Sirica: That is right.

The Court: Now, even if he had said that that statement was true, and every word in it was true, it would not be admissible against these other defendants.

Mr. Sirica: The only purpose of putting Mr. Collins on——

The Court: The only purpose that I can see would be to in some way give credence to the facts that were in the statement, by showing what he had said on another occasion. You can't prove anything to make that statement evidence, and you can't, as I see it, make statements that he made to Mr. Collins admissible against these others.

Mr. Sirica: We are not trying to show that.

The Court: We have gotten pretty far afield.

Mr. Sirica: He denied certain statements; he denied saying certain things to Mr. Collins and myself in the office. The only purpose of putting Mr. Collins on is to show that he did say those things. We are taken by surprise. In the grand jury room, I want to ask Mr. Collins about what took place up there.

The Court: What is the evidentiary value? Supposing he says that as a reason that he did not stick by his statement was because he was terrorized.

Mr. Sirica: There seems to be no question about it. I withdraw the witness.

The Court: That he had been terrorized. If he had made any accusation against you or Mr. Collins that you tried to intimidate him, I would allow it.

Mr. Sirica: We wanted to prove everything before the jury. But I withdraw Mr. Collins at this time.

The Court: I don't see that everything you can do would bring back into the picture anything but that he repudiated it. I don't think you can do that.

Mr. Sirica: We have offered the statement and the other exhibits, and we rest at this time."

* * * * *

“The Court (interposing): Last afternoon just as we adjourned, I think, Mr. Sirica, you offered in evidence the confession of Grove, did you not?”

Mr. Sirica: The statement by which we sought to impeach the witness Grove, your Honor.

The Court: Is that admissible?

Mr. Sirica: Not as against the other defendants, but I contend it is admissible for the purpose already stated.

The Court: It is only admissible as against him and he is not a defendant. I am afraid I will have to refuse it. It couldn't be read as against these defendants.

Mr. Sirica: The only reason I offered it was because it was a statement the defendant Grove made to us and used here when he became a witness under the circumstances I mentioned.

The Court: If he were a defendant here in Court, it would be different. But he is not a defendant here today.

Mr. Sirica: I am prepared to show your Honor some cases at this time on the admissibility of statements in evidence where a defendant pleaded guilty, in cases similar to this, only in one case it was a robbery, where the man was placed on the stand and gave testimony different to that which he had stated to the District Attorney when upstairs. At the time he made the statement he had signed it. He was shown that statement and his statement was used in evidence, and was offered in evidence, the same as we did in this particular case. I should like to show your Honor this case before you rule on that point.

The Court: I will be glad to see any cases you may have, of course.

Mr. Sirica: I will send for them.

The Court: Even if he had not repudiated the statement it would not be admissible against the other here.

Mr. Sirica: We do not contend that, because they denied it.

The Court: How in any aspect of the case is it admissible as against the other? Even if Grove, had not repudiated the statement at all, how could it be admissible as against them?

Mr. Sirica: We do not contend it is admissible against these defendants at all. The only reason we offered it was to show the inconsistent statements Grove has made, at this time as compared to the statement he made before. It is admissible to impeach the witness Grove.

The Court: If Grove were on trial here of course it would be admissible against him, and then his statement or evidence repudiating it and all that would have been a matter for the jury to consider.

Mr. Sirica: Here is the position we are in, your Honor: We put the witness Grove on the stand. He told us the last time we talked to him that the statement he first made and which he read over was a true statement. Then when he came on the stand and we were taken by surprise your Honor gave us the right to cross-examine him and use it as an inconsistent statement.

The Court: To treat him as a hostile witness.

Mr. Sirica: Yes. And that statement was offered to show the statement that he first made, and it is for the jury to say whether he told the truth the first time or here on the stand.

Mr. Kelly: Oh, no.

Mr. Whelan: Oh, no.

The Court: Suppose Grove was telling the truth at first, it would not be evidence against the other three defendants unless it was read in their presence and either by silence or in some other way they, one or more, acquiesced in it, unless there would have been an admission of its truth by their acts or conduct."

* * * * *

"The Court: You certainly could not read that statement to the jury as evidence against these three defendants.

Mr. Sirica: No, your Honor, and I am not so contending. But I am contending that——

The Court (interposing): For what purpose is it admissible? If it would be admissible at all as I see it, it would be only for the purpose of showing your good faith, Mr. Sirica, in asking these questions."

* * * * *

"The Court: Well, I can see how it might be admissible if the claim were made that you were bound by the testimony of the man on the stand. It would be admissible to show you are not bound by it.

Mr. Sirica: That is the point we want to impeach the witness on.

The Court: It comes down to the point of showing your good faith, of relieving you of any possible charge of trying to put before the jury evidence that you knew was true.

Mr. Sirica: Doesn't it come down to this regardless of that, that when we place a witness on the stand we vouch for his credibility. We say he is going to testify to certain things, as I outlined in the statement to the jury on yesterday; everything that he told us in that statement practically I told the jury on yesterday. When I put him on the stand I expected him to follow that statement, because that was the last statement he told us as the truth. When he testified differently I announced I was taken by surprise and asked the right to cross-examine him. That statement is admissible against him, to show that we are not bound by his testimony that he gave on yesterday in court, and we offered it to impeach him. I do not see any harm that is being done by admitting that statement. It was done in the other case.

Mr. Whelan: If your Honor please, we say that the District Attorney was not taken by surprise, by reason of the fact that——

The Court (interposing): I do not want that point argued. We have been over that here at the bench."

* * * * *

Mr. Whelan: Following up the observations made at the bench on yesterday, as to Bedell I do not believe the statement is admissible, I do not believe there was sufficient surprise, and do not believe it is proof that should go to the jury. So we note an exception.

The Court: All right.

Mr. Sirica: We offer again in the record a statement showing the occupancy in the Southern Apartments, Fifteenth and M Street, Northwest, an apartment by Bedell known under the name of J. B. Walsh, which was offered on yesterday and I think received without objection. I am now just renewing that offer.

Mr. Whelan: I object to that.

The Court: What is that corroborative of?

Mr. Sirica: It is corroborative evidence in the case that this defendant Bedell did live in the Southern Apartments, and that he lived there under the name of Walsh. Whether or not that makes any difference or not we are not arguing now, but it is evidence to show that he was arrested at the Southern Apartments, and that he lived at the Southern Apartments. All these circumstances I submit to go to the jury.

The Court: Well, it has already been received, has it not?

Mr. Sirica: Yes, I think on yesterday.

The Court: I will allow that.

Mr. Whelan: Your Honor will permit us an exception.

The Court: Yes.

Mr. Sirica: We rest."

* * * * *

The Government thereupon closed its case, and the defendant Bedell, through his counsel, moved the Court to direct a verdict of not guilty, which was overruled. The defendant Pagliocchini was called as a witness and

testified very frankly that he was present when the robbery was committed and took part in it, together with Grove and another man. They went together there on the night in question, and he corroborated everything that Grove had to say regarding the robbery, and stated positively that Bedell and Cush were not with him; that he had never met Bedell up to the time of the robbery; the first time he met Bedell was during the first week of August after the robbery had been committed. He testified that he got around eight or nine hundred dollars out of the safe and that Grove got at least three hundred dollars. When asked to name the third man he said that he did not care to bring the man's name out, because the witness Grove had already given the man's name in Court, although he did say that he had known the man by the name of 'Buggy'. He testified in detail how they met at Fifth and D Streets, Southeast, himself, Grove and Buggy, and in pursuance of a pre-arranged plan, went to the Breyer Ice Cream plant and committed this robbery. The witness testified that he first met Bedell in connection with an attempt to sell him an automobile: that he went to Bedell's apartment on two or three occasions during the month of August for the purpose of selling this car to him.

Whereupon, the District Attorney cross-examined the witness in the following manner:

"Q. Why didn't you tell the police officers about the third man when you were first questioned? A. Because, I didn't care to bring anybody into it.

Q. You didn't want to bring anybody into it? A. No.

Q. You would bring somebody into it in order to save an innocent man, wouldn't you. A. Well, here is how the thing stands——

Q. (Interposing.) Would you or not?

Mr. Whelan: Let him finish his answer.

Mr. Sirica: Let him answer my question and then he can explain it.

Mr. Whelan: Counsel for the Government has asked a question and now the witness wants to tell about it and he won't give him an opportunity.

The Court: Let him answer the question.

By Mr. Sirica:

Q. Answer my question. You would bring a man in that you knew was guilty in order to save an innocent man, wouldn't you. A. Well, the way the thing was is this way——

Mr. Whelan (interposing): I object.

By Mr. Sirica:

Q. Would you bring a man in that you know was guilty in order to save an innocent man? A. I don't care to answer.

Q. Answer yes or no.

The Court: He says he does not care to answer.

By Mr. Sirica:

Q. You remember going to the Police Court last summer when this boy Grove was locked up, don't you? A. Yes, sir.

Q. Going in the Black Maria? A. Yes, sir.

Q. And you remember telling him not to tell anything, don't you. A. Telling him not to tell anything?

Q. Yes. A. I didn't tell that. I told him to tell the truth. I said to get these men out, that they didn't have anything to do with it.

Q. Why didn't you tell the truth on that accasion? A. Well, I just didn't want to talk about it.

Q. Why did you put Grove up to all your dirty work? A. I didn't put Grove up to dirty work. He told the thing, but he told in a complicated way, and I let it go at that.

Q. You were downstairs locked up? A. Yes, sir.

Q. Grove came back after he talked to me, and you had heard he had talked to an Assistant District Attorney, hadn't you? A. I didn't know he had talked to anybody.

Q. You talked to him after he came downstairs, didn't you? A. I didn't talk to him.

Q. What did you say to him? A. I didn't say anything, but I told him he was punk.

Q. He is punk in your estimation, is that it? A. Yes, sir.

Q. Because he won't protect you or some of your friends? A. No, because he didn't bring up the truth about the thing.

Q. You remember now the particular occasion I am referring to, in the Police Court, when I sent for him again and took him back up and he said he would testify. You had talked to him then? A. No.

Q. You say you told him to tell the truth? A. Yes, sir."

The witness further testified that he did not say anything at the Police Court because he was not called to the stand. In response to questions why he did not tell Officer Talley that the witness Grove was not telling the truth, the witness testified:

"A. I told him that.

Q. When did you tell Talley that- A. At the Police Court.

Q. Did you tell him the truth about it? A. He asked me was the statement true and I said no.

Q. The statement was true about your going to the Breyer Ice Cream Company? A. But it was not true about his bringing innocent people into it.

Q. Why didn't you tell Officer Talley about your going to the Breyer Ice Cream Company plant? A. I didn't care to tell him, is all.

Q. You remember over at Headquarters when in the room with Grove that Grove had made a statement and you made some remark to Grove over there, and you called him 'a little punk' or something, didn't you. A. Over at Headquarters?

Q. Yes. A. I did not.

Q. Of course you wouldn't do anything to Grove if you could get your hands on him? A. No; I wouldn't do anything to him.

Q. No, not at all I suppose. How many times have you threatened this boy? A. I have not threatened him at all.

Q. You never saw him at all? A. I never threatened him at all.

Q. Did you have anything to do with putting a knife in the cell at the jail? A. No. I had nothing to do with putting a knife in the cell. Besides, the way you are searched when going into the jail it is impossible to carry a knife into it.

Q. I am going to ask you again to tell us who the third man is who was on this job. A. I have been knowing him by the name of Buggy.

Q. How many jobs have you done with him?

Mr. Rose: I object to that.

Mr. Sirica: I want to question him on it to show how well he knows him.

The Court: You have a right to cross-examine the witness.

By Mr. Sirica:

Q. Was that the first job you had done with this man Buggy? A. No.

Mr. Rose: Your Honor, I object to that.

The Court: On what ground?

Mr. Rose: On the ground that this is aside from the matter now before the Court.

The Court: It would affect his credibility.

Mr. Rose: It would incriminate him."

* * * * *

Witness then described the manner in which they committed the robbery and admitted that he knew a man named Fox and knew where he lived. That it

was so dark in the place that it would be impossible to recognize a face: that Grove and the other man had handkerchiefs over their faces, but he, the witness, did not. That his reasons for taking the stand and making a clean breast of the matter was because of the innocent men involved in it and he did not think it right not to tell the truth, and that Bedell and Cush had nothing whatever to do with the robbery. That his reason for not telling the story before was that he did not want to be a witness against anybody. That he was taken to headquarters and placed in the line-up with Bedell, and that they were not identified on the first occasion, but were identified on the second occasion. He further testified that he had plead with Grove with tears in his eyes to tell the truth about the matter.

The defendant, WILLIAM ESTES BEDELL, took the stand in his own behalf and testified that he took no part whatever in the robbery of the Breyer Ice Cream plant: that when he was placed under arrest and taken to police headquarters, he was twice put in the line-up and that the witness Lee failed to identify him on the first occasion, but did identify him on the second occasion. That after the identification in the office of Mr. Talley, they read Grove's statement over to him and he immediately told Talley that it was false, and when told that he had been identified, he also stated that it was a case of mistaken identify, and immediately said to the witness Lee "Uncle, have you ever seen me before?" to which Lee replied "No", and Mr. Talley immediately prompted the colored man by suggesting to him that "You mean that you have never seen him before the night of the robbery?" to which the colored man said "Yes".

The witness testified that he had paid some fines for violations of the liquor laws, and thereupon the following occurred in response to questions by the United States Attorney:

“Q. You are also known as Hilton Brunswick Wilson, aren't you? You used to use that name?”

Mr. Whelan: I object. That is utterly improper, I submit, your Honor.

Mr. Sirica: I can show——

Mr. Whelan (interposing): What difference does it make?

The Court: How do I know what difference it makes? I do not see anything improper in it.

Mr. Whelan: We object to the question.

The Court: On what ground?

Mr. Whelan: Why, then, he could ask him if he wasn't known as Jesse James.

The Court: Yes.

Mr. Whelan: The Prosecuting Attorney could ask any questions for their inflammatory effect, but it is improper in law.

The Court: What is your objection?

Mr. Whelan: It is improper and irrelevant and does not have any probative force in this case.

The Court: Overruled.

Mr. Whelan: We note an exception.

By Mr. Sirica:

Q. Did you go under the name of Wilson Brunswick?
A. I don't remember it.

Q. In 1922?

Mr. Whelan: I object.

By Mr. Sirica:

Q. Did you ever use that name?

Mr. Whelan: Just a moment.

Mr. Sirica: Well I will say last year.

Mr. Whelan: I move to withdraw a juror because the Prosecuting Attorney is asking the defendant something about a name back in 1922, ten years ago. I submit that it would not make any difference at all, and that the only purpose of it is to prejudice the accused before the jury.

Mr. Sirica: You know that is not the purpose.

The Court: I can see a whole lot of things it might be inquired about for.

Mr. Whelan: Let the Presecutor state his purpose to your Honor at the bench.

The Court: It seems to me it might have some bearing on his credibility.

Mr. Sirica: I want to find out what his occupation is.

The Court: Objection overruled.

Mr. Whelan: We note an exception."

Thereupon, the witness admitted that he might possibly have used that name in 1922, but that his correct name was William Estes Bedell. He further admitted that he rented the apartment in August under the name of J. B. Walsh and over objection testified that the reason for renting it in that name was that he was connected with the liquor business. He further testified, on cross-examination, that he was not in the business of buying automobiles, but that he had had some negotiations with Pagliocchini for the purchase of a car, although he did not buy it. He admitted that Grove and Pagliocchini had been to his apartment on two or three occasions, but he could not give the dates and that at the time of the robbery he knew that he was home because he had been home every night during that period.

CARLTON TALLEY was recalled to the stand and testified that Bedell had told Lee that he had made a mistake, but that he did not recall that Bedell referred to him as uncle, and made the following statement in response to a question as to whether or not he had been looking for Beichert: "I have not been looking for the man that has been mentioned in this case. I looked just for the man to come to see me. If I wanted the man I would have went to his home and got him."

Thereupon, the defendant Pagliocchini entered a plea of guilty to the charge and the Court directed a verdict of not guilty as to the defendant Cush, and overruled this defendant's motion for a directed verdict.

The Court charged the jury and in the course of his charge made the following remarks:

“I think I ought to elaborate a little on the so-called confession of Grove. You remember he was produced on the stand and it appeared that he had signed a paper, and it also appeared that his testimony, testimony which he was about to give, would be in the nature of a repudiation of what was given in that paper, which I held gave the District Attorney the right to treat him as a hostile witness, that is, to go at him and see if he could worm it out of him, as he would at a hostile witness. Without any fault on his part, he failed in that attempt, not any criticism of him. The witness simply laid down on him, that is all, and we cannot help it. He gave no testimony on the stand that implicated anybody in this crime except the defendant Pagliocchini, who has already pleaded guilty. So he is out of it.

Now, the questions which the District Attorney asked and which implied, of course, that Grove had given testimony implicating Bedell, must be disregarded by you entirely. I know you can do it. There is no evidence in this case against Bedell that was given by Grove. There is not any doubt about that. No matter whether he is a liar or a thief or what he is, so far as this case goes he has given no evidence on the stand against the defendant Bedell.”

The jury retired and returned a verdict of guilty as to the defendant Bedell on both counts.

ASSIGNMENT OF ERRORS

1. The Court erred in permitting attorney for the United States to cross-examine the witness, James E. Grove, a witness produced on behalf of the Government, on the theory that the Government was taken by surprise.

2. The Court erred in refusing to permit counsel for the defendant to produce testimony to establish the fact that the attorney for the United States was not taken by surprise.

3. The Court erred in permitting counsel for the Government to cross-examine the witness Grove regarding a statement alleged to have been made by him to the Police Department out of the presence of the defendant, Bedell, and in permitting the United States Attorney to read in the presence of the jury parts of the statement.

4. The Court erred in permitting the United States Attorney to cross-examine the defendant, Bedell, on collateral issues not contained in the direct examination.

ARGUMENT

These assignments of error are so closely related to each other that they may be taken up together. It has been thought advisable to set out in the statement of the case, in detail, a great deal that took place at the trial of the case. This is done in order that this Honorable Court may have before it as accurately as possible a picture of just what took place. It is to be noted that the Government, in the preparation of its case, placed great reliance on the witness, Grove, and depended on him to identify both the defendants, Cush and Bedell. It is also apparent that there came a time prior to trial when the Government realized that Grove might not be a dependable witness, and that this is true is indicated by the fact that it came to the knowledge of the United States Attorney that Grove had repudiated his original statement on more than one occasion. Thereupon, the Government brought Grove to the Grand Jury room and confronted him with his statement in the presence of at least two Assistant United States Attorneys, police officers, his father, who was a police officer and others, and at that time asked him whether or not his statement was true and Grove said that it was. This witness had plead guilty and had been confined in jail for a number of months awaiting sentence, and it is respectfully submitted that this was a form of coercion, which may have prompted him to say that the statement was true. However, the witness Grove, himself, testified that he sent word and went back within five minutes and told them that the statements were not true, and he further testified that he never was given an opportunity to tell the entire truth about the matter. In this situation, the Government,

having gotten its witness into a frame of mine where it was felt he would testify favorably, proceeded with this case, and when Grove was placed on the stand he repudiated the statement. At this time the Government announced surprise and asked permission to cross-examine the witness and to impeach him. The court ruled that this was permissible and permitted the Government to treat the witness as a hostile witness, although there was certainly no hostility. The statement that Grove had made to the police was not competent evidence against the defendant, Bedell, and when the witness admitted that he had made contradictory statements but stated that those contradictory statements were not true, it is contended on behalf of this defendant that it was error for the Court to allow the detailed examination of the witness, not only regarding the statement, but along other lines which had no bearing upon the statement. The court, by his remarks at the bench, in which he stated that the witness was a weakling, clearly indicated that the court was of the opinion that the defendants were guilty, but that the witness Grove, for some unknown reason, was attempting to shield them. From that point on, throughout the entire trial, the court permitted the District Attorney to ask questions at random that were detrimental to the interest of the defendants and the judge's remarks in various stages of the trial, clearly displayed a bias against the defendant.

In the case of Kuhn v. United States, 24 Fed. (2d) 910, the court used the following language:

“Thereupon the district attorney produced what he represented to be a written statement previ-

ously made by the witness to government agents, and over the strenuous and repeated objections of defendants he was permitted to read from the document each question and answer therein contained, with a question to the witness, in each case, whether he was not so asked and did not so reply. *The procedure was improper*, and after reflection, during an ensuing recess of the court, the district attorney, upon the coming in of the court, of his own motion consented that all the objections be sustained, and that all the testimony be withdrawn from the consideration of the jury. Thereupon the court struck out the testimony, with an admonition to the jury not to consider it, and again in the final instructions explicitly so advised the jury. * * *

“While a party is not to be denied the right to attempt to prove his case by an unwilling witness, he is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of such witness, by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.”

Again, in *Sneed v. United States*, 298 F. 911, the Court used the following language:

“That a party may freely contradict the facts testified to by his witness through other witnesses is beyond question. That he may not attack generally the character and integrity of a witness voluntarily produced by him is also established. He may call to the attention of his witness a previous statement to refresh his recollection, and if the witness appear to be hostile or unwilling, may

be allowed to ask leading questions. * * * Whether, if the witness deny the contradictory statement attributed to him, he may be impeached to the extent of proving it, has been the subject of great diversity of opinion, and the occasion of many statutes."

This case is also cited with approval in the case of *Sullivan v. United States*, 28 Fed. (2d) 147, wherein, quoting from the case of *Zipperlen v. Southern Pacific*, 7 Cal. App. 215, the court had this to say:

"It must be conceded that the rule authorizing the contradiction of one's own witness is, in its application, like the rule as to impeachment, attended with more or less danger of producing injustice, and, therefore, should never be invoked or allowed to be exercised by the court except where the exigencies of the situation and the circumstances of the alleged betrayal clearly warrant it. * * * So, when the witness gives evidence which tends to destroy rather than build up the cause of the party who has presented him to the court and jury as a person possessing information valuable and material to his side of the controversy, the law steps in and says that no litigant should thus be placed at the mercy of such treachery, and authorizes the party to explain why he called him as a witness and thereby acquit himself of the otherwise disadvantageous imputation of contributing toward making out a case against himself. *But a party, under the guise of the rule in question, will not be suffered to present to the jury mere hearsay declarations—declarations admissible neither under the rule of res gestae nor as having been made in the presence and hearing of the party against whom they are offered.*"

This case is not one where the witness denied having made prior contradictory statements, but a case in which a witness admitted the prior contradictory statements, but stated that they were not true and wanted to tell the truth about the entire matter. It then and there became and was the duty of the Court to make an investigation for the purpose of determining just exactly what the situation was, so that if the Court, on examination, found that there was reason to believe that the testimony as given by the witness on the stand was true, the defendant could have the benefit of it. The defendant Bedell was in this position. From the very outset, he had denied any connection with the crime charged. Two defendants, who admitted their participation in the robbery, plead guilty and denied that Bedell had any connection with it whatsoever, and Bedell in his own behalf, took the stand and also denied that he had anything to do with it. The only testimony against Bedell was the identification of the old colored man, seventy years of age, who admittedly had poor eyesight and admittedly could not identify the witness Grove, although Grove testified that he, himself, was the man who tied the colored watchman up at the time of the robbery. Further, that the colored watchman's mental faculties were not keen is evidenced by the fact that he testified that it was two or three days after the robbery when he went to headquarters to make the identification, when as a matter of fact it was more than a month later. He was not at all definite as to the part any particular one of the defendants

played in the robbery itself. If the evidence had been properly restricted, it is respectfully submitted that the testimony of Grove, Pagliocchini and Bedell, standing against the testimony of the witness Lee, drew a sharp issue of fact for the jury to determine and this the jury should have been permitted to do without the extraneous matter that was injected into the case. The beneficial effect of the testimony of Grove and Pagliocchini was completely destroyed by the manner in which the court permitted the District Attorney to examine these witnesses.

It is true that the question of surprise is a matter that ordinarily is within the sound discretion of the court, but in a case such as the one presented here, with the background that this case appears to have had, it is hard to conceive on what theory the District Attorney could have been taken by that surprise which is contemplated in law. He had doubt in his mind prior to the trial regarding what the witness would testify to. That this is true is evidenced by the fact that he called the witness to his office on two or three occasions in an effort to convince himself what the witness would testify to. It seems that his object was to get the witness in a frame of mind where he would say that he would testify favorably, and then fortify himself in the event the witness did not stand up, with a lengthy cross-examination, such as developed here.

In the case of Hickory vs. United States, which is the leading case on the question of surprise, reported in 151 U. S. 303, the Court said:

“When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness. As to witnesses of the other party, inconsistent statements, after proper foundation laid by cross-examination, may be shown (*Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S. 507 (34:747)) but proof of the contradictory statements of one’s own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law. *Best, Ev. Sec. 645; Whart. Ev. Sec. 549; Melhuish v. Collier*, 15 Q. B. 878.”

See also: *Putnam v. United States*, 162 U. S. 687; *Moore vs. United States*, 150 U. S. 57; *State vs. Wolfe*, 70 A. L. R. 1039, with annotation on page 1042; *St. Clair vs. United States*, 154 U. S. 134.

The statement of Grove to the police was not a substantive piece of evidence and was not admissible against this defendant. However, in permitting the District Attorney to question the witness about the statement and asking him whether that statement was true or whether his testimony on the stand was true, it clearly brought into the case the issue of which what statement was true, whereas, in truth and in fact, the jury was not concerned with and should never have been permitted to have before them any parts of the

statement. It was perfectly competent for the Government to break down the testimony of Grove as given from the stand by any competent testimony, but to do so by innuendo as to threats, fear, and improper influence, all of which were denied and none of which was proved, took away from the defendant that right to a fair and impartial trial, to which he was entitled.

It is very respectfully submitted that the court indicated very plainly that he was of the belief that the testimony of the witness, as given on the stand, was not true and while it is true that the court has the right to comment on the testimony of any witness, at the same time the Court should not do so in such a manner as to indicate his personal views.

In the case of *Ruppert v. Wolf*, 4 Appeals D. C., at page 556, on page 560 the court said:

“We can readily understand how, in the presence of confessed guilt on the part of this witness and of testimony implicating his deceased employer in a crime of which no one during his lifetime would have supposed him capable, the just indignation of the presiding justice must have been aroused. And it may be, also, that there was something in the manner and conduct of the witness in the court room that served to intensify this indignation. But in view of what the Supreme Court of the United States has pointedly said in the case of *Hicks v. United States*, 150 U. S. 442, and yet more pointedly in the more recent case of *Starr v. United States*, 153 U. S. 614, we must hold the utterances of the learned justice in this case as unduly prejudicial to the cause of the caveators and as constituting grave error.”

In the case of *Hicks vs. United States* supra, the Supreme Court, by Mr. Justice Shiras, said:

“It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and perhaps a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance; and that the law in its wisdom has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word, properly enough, the jury give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that ‘the person charged shall, at his own request, but not otherwise, be a competent witness.’ The policy of this enactment should not be defeated by hostile comments of the trial judge whose duty it is to give reasonable effect and force to the law.”

And again in *Egan v. United States*, 52 Appeals D. C. 384, on page 397, this Court said:

“Numerous other exceptions were noted to the conduct of the trial judge in ruling upon the admissibility of evidence and commenting thereon in the presence of the jury. In other words, these exceptions challenge the demeanor of the judge toward defendant. While there is perhaps no single instance involving error so prejudicial as to warrant reversal, we are convinced that, considered as a whole, the rights of defendant were so

prejudiced thereby as to deprive him of that fair and impartial trial which the Constitution and the law of the land accords to every citizen accused of the commission of crime. The trial judge should be so impartial, in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused.”

It is to be noted that when the witness Lee incorrectly read the clock, the court very promptly interposed and asked a question in order to give the witness a chance to correct it, if he could. Again when the defendant Bedell was on the stand, the court permitted counsel for the Government to question him regarding whether or not he had ever used the name Hilton Brunswick Wilson. The Court not only permitted the examination, but stated he did not know what difference it might make and did not see anything improper in it and even went so far as to say it would have been proper to ask the witness whether or not he wasn't known as Jesse James.

It is also to be noted that the witness Grove, as well also as the witness Pagliocchini, both of whom testified that Bedell was not there, went so far as to name the man who was actually there and took part in the robbery. That this was not a fictitious person is evidenced by the fact that Officer Talley himself stated that he knew the man referred to by the witnesses and knew that he had been engaged in the robbery of a safe, and that if he wanted him he could have gone to his house and got him. Instead of doing this, he simply

said he looked for the man to come and see him. This clearly indicated that for some mysterious reason, not only the police, but the District Attorney, had determined to convict the defendant, Bedell, of this particular offense and were not interested in making any effort to give him the benefit of any facts that might tend to establish his innocence and certainly showed no disposition to verify the statements of Grove.

In his charge to the jury, the Court appears to have made an effort to correct the damage, but a careful analysis of the charge clearly shows that he did not do so. The court made the direct statement that the witness Grove had laid down on the District Attorney and then characterized him in the following manner: that "whether he is a liar or a thief or what he is, so far as this case goes he has given no evidence on the stand against the defendant Bedell". The witness had given substantive testimony on behalf of Bedell and Bedell was entitled to the benefit of that testimony before the jury. Whether the jury saw fit to believe the witness or not is beside the question, but the court should not have characterized the witness in the manner in which he did.

The court, in its charge to the jury, on more than one occasion, was particular to say that the only *direct evidence* against Bedell was from the old colored man. As a matter of fact, the only evidence against Bedell was from the old colored man and by using the term 'the only direct evidence' might easily have lead the jury to believe that the other matters, which were

brought out at the trial while not direct evidence were matters for them to consider.

There was a very clear-cut issue of fact in this case as to whether or not Bedell participated in this robbery. In the statement, Grove had implicated Cush as well as Bedell, but it developed that there was no evidence against Cush so that if the statement of Grove was wrong about Cush, it could have been wrong about Bedell, and in all probability his statement on the stand was true. In a situation of this kind, it was the duty of the court to use the utmost care that no word or act of his might influence the jury and the injection into the case of collateral matters highly prejudicial to the rights of this defendant undoubtedly caused the jury to arrive at its verdict.

See United States vs. Sager, 49 Fed. (2d) 725.

CONCLUSION

It is therefore respectfully submitted that the defendant Bedell did not receive a fair and impartial trial, to which he was entitled under the law, and that the judgment should be reversed and a new trial ordered.

Respectfully submitted:

HARRY T. WHELAN,

WILLIAM B. O'CONNELL,

Attorneys for Appellant.

FOR MR. CHIEF JUSTICE MARTIN

NOV 25 1933

Harvey M. Bridges

CLERK

No. 5973—Special Calendar

In the Court of Appeals of the District of
Columbia

APRIL TERM, 1933

WILLIAM E. BEDELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

BRIEF OF APPELLEE

LEO A. ROVER,

United States Attorney.

JOHN J. SIRICA,

Assistant United States Attorney.

In the Court of Appeals of the District of Columbia

APRIL TERM, 1933

No. 5973—SPECIAL CALENDAR

WILLIAM E. BEDELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant, William E. Bedell, and James E. Grove, William F. Cush, August Pagliocchini, were charged with the crime of housebreaking and larceny (R. 1, 2).

The defendant James E. Grove pleaded guilty to this charge when he was arraigned and was used as a Government witness. The Court directed a verdict in favor of the defendant Cush at the conclusion of the Government's case. The defendant Pagliocchini pleaded guilty after all the evidence

for the Government and for the defense had been introduced (R. 50). The jury returned a verdict of guilty as to the defendant Bedell and he was sentenced to serve from three to five years in the penitentiary. From that judgment he appeals to this Court.

In order to give the Court a true picture of what transpired in this case, it will be necessary to discuss the evidence as taken from the Transcript of Record, and not as misinterpreted by counsel for appellant in their brief.

About one o'clock A.M. on the morning of July 26, 1932 the plant of the Breyer Ice Cream Company, located at 1830 Bladensburg Road, Northeast, in this District, was entered, the safe broken into, and approximately \$900 taken from said safe.

One Herbert Lee, a colored watchman on duty at the plant at that time, was grabbed by three men armed with guns and tied up with some wire (R. 26-28).

On August 28, 1932 one Joseph F. Bowers, a member of the Metropolitan Police Department found a Dodge automobile on Tenth Street, between L and M Streets, in the rear of Earnshaw's warehouse. In this automobile were found some punches and four chisels (R. 28). The officer made an investigation to determine the ownership of the car and found that the automobile was listed to the defendant James E. Grove (R. 30). He located the defendants Grove and Pagliocchini at Capitol

Heights and placed them under arrest (R. 30). As a result of information which he obtained from Grove, the officer then arrested the defendants Bedell and Cush the following day, in front of the Southern Apartments, located at Fifteenth and M Streets, Northwest (R. 28-30). During the conversation which the officers had with Bedell and Cush, following their arrest, both defendants denied knowing Grove and Pagliocchini. After they were taken to Headquarters, Bedell admitted that he knew Grove, but stated he only knew him by the name of "Jim" (R. 30).

Evidence was offered by the Government to show that during the month of July the defendant Bedell had rented an apartment in the Southern Apartments, at Fifteenth and M Streets, Northwest, under the name "J. B. Walsh" and that he occupied that apartment until August 22nd. The evidence further disclosed that during this period the defendants Bedell, Cush and Pagliocchini were seen together at this apartment house (R. 28, 29) and that Grove had been there on two occasions.

On August 31st the defendant Grove, after he had been warned of his rights by police officers, and in the presence of his father, who was a member of the United States Park Police, and other members of the Metropolitan Police Department, made a statement which not only implicated himself in the Breyer Ice Cream Company job, but also the three defendants Bedell, Cush, and Pagliocchini (R. 15).

This statement was reduced to writing and signed by Grove. He stated that on the night of July 25th, about 7:00 P.M., he met August Pagliocchini, who was known to him as "Mussolini", William Francis Cush, known as "Doc", and William Bedell, on Pennsylvania Avenue, between Sixth and Seventh Streets, that at that time Mussolini said that he had been watching the Breyer Ice Cream building for about a week, and that a man stayed there until midnight and that after midnight there was no one there; that Mussolini said it was an easy job, and Bedell said he would take it; that they stayed together the rest of the evening, riding around in a Buick roadster driven by Bedell; that after going to Glenburnie, Md., they arrived at Sixth and Pennsylvania Avenue, Southeast, about 11:45 P.M. (R. 17); that Grove then got his Dodge car and drove to Fifteenth Street, between L and M Streets, Northwest, where he parked; that Bedell followed in the Buick; that Grove then got into the Buick driven by Bedell and then they all drove to the alley in the rear of Bedell's apartment in the Southern Apartments, at Fifteenth and M Streets, Northwest; that Bedell then went into the building and came out with a burlap bag containing tools (R. 18); that they then went to New York Avenue, near Bladensburg Road, near the Breyer Ice Cream plant and parked the car.

Grove further stated that he got out of the car and went over in a field to act as a lookout, and that

Bedell, Cush and Mussolini entered the building through a side window (R. 18); that after they were in there about thirty or forty minutes they came out and got into the car and picked him up on Bladensburg Road, about 500 feet from the Breyer Ice Cream Building; that they then drove back to the alley in the rear of the Southern Apartments, and he was handed between \$10 and \$20. (R. 19); that he then got his car, which was parked on Fifteenth Street, Northwest, between L and M Streets, and drove to his home at 510 D Street, Southeast (R. 19).

Each of the defendants Bedell, Cush and Pagliocchini denied this statement when it was read to them.

A short time after Grove made this statement the watchman, Herbert Lee, who was tied by three men on the night of the robbery, was brought to Headquarters to identify the men who had tied him. On the first occasion he saw two men, who were not any of the defendants under arrest. On the second visit five men were placed in a line-up. The witness Lee identified the defendants Bedell and Pagliocchini as two of the three men who had tied him on the morning of July 26th, but could not identify the third (R. 27, 28). While the witness Lee was testifying in this case the defendant Grove was called into the court room by counsel for the defendant Bedell, and Lee was asked if he

had seen Grove before. The witness replied that he had not seen him on the night of the robbery (R. 28).

ARGUMENT

Insofar as practicable, appellee will attempt to discuss the assignments of error in the order in which they are presented in appellant's brief.

It is the contention of appellee that when the witness Grove testified that he did not see the defendants on the night of July 25, 1932, or go anywhere with them that night, appellee was taken by surprise, and the Court did not commit error in allowing counsel for the Government to cross-examine Grove (R. 10).

The record discloses that about a week before the trial James Grove was sent for and brought to the Grand Jury room. In the presence of his father and several police officers he was shown the statement which he first made to the police, and was asked to read it over. After Grove had read it over he was asked if the statement was true, and he replied that it was (R. 22, 23). He was asked why he was afraid of the bunch, and he replied as follows: "Why you don't know what a coke-head like Bedell would say if he got out of jail or I got out." (R. 31). He also said, "It is all right for you prosecutors, but how would you like to wake up in your cell and find a three-inch blade knife there? Wouldn't you think before you testified?" (R.23.)

Instead of anyone being guilty of coercion, as stated in appellant's brief, a reading of the record will convince the Court that the witness Grove was afraid of the other defendants and was subjected to repeated threats by one or more of them at different times. Counsel for the appellant would have the Court believe that after the witness Grove stated in the Grand Jury room that his written statement was the truth, he repudiated this statement five minutes later. This is but another instance of counsel for appellant misquoting the testimony.

The record discloses that on one occasion the witness Grove did go to the office of Assistant United States Attorneys William H. Collins and John J. Sirica and told Mr. Collins that everything was true. The record further discloses that he came back in five minutes and told Mr. Collins that these statements were not true, but would not name the two men that were with him on the night of July 25th (R. 25, 26). After counsel for the appellant learned that the witness Grove had repudiated his statement, which necessarily meant that Bedell and Cush were not present, they asked that this case be set down for trial. Before setting this case for trial, the witness Grove was sent for. What transpired on this occasion in the Grand Jury room has already been discussed. Counsel for the Government never talked to this witness from the time he left the Grand Jury room until the time he took the

stand for the Government, about a week later. The Government expected him to make the same statement on the stand that he had made about a week before, and when he testified that he did not see the defendants that night, the Government was taken by surprise and so announced to the Court.

Section 1073-a of the District of Columbia Code provides as follows:

Whenever the court shall be satisfied that the party producing a witness has been taken by surprise by the testimony of such witness, such party may, *in the discretion of the court*, be allowed to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to such party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statements and if so allowed to explain them.

A case which supports the contention of the Government is *United States v. Smith*, 57 App. D.C. 71. In that case one Belhummer had made a detailed statement to Assistant District Attorneys and police officers, which statement was reduced to writing, signed and sworn to by him. Before court convened on the day on which Belhummer was offered as a witness on behalf of the Government, he stated

to the Assistant District Attorney in charge of the prosecution that the statement theretofore made by him was true. Upon taking the stand, however, he stated that he was alone when the robbery was committed, and saw Smith for the first time the next day. In short, he entirely exculpated the defendant from any part in the crime. Counsel for the Government, upon the ground of surprise, sought and obtained from the court leave to cross-examine the witness. In granting this request the court cautioned the jury as follows:

This witness here, introduced as a witness for the government, testified, and the government counsel thereupon stated he was surprised in his testimony, substantially to the effect that he expected him to testify differently from what he did, and in substantiation of this he has produced here a written, rather a typewritten, statement, which the witness admits that he signed, but now this typewritten statement cannot be considered by you as any testimony of the guilt of the defendant in this case. In other words, it was a statement which was not made in court. It is simply admissible in order that the government may show that, in introducing this witness, they had reason to believe he would testify differently, and therefore to impeach this witness, so that the government will not be bound by the testimony he has given in this case; but it is not evidence of the facts stated in the paper at all.

Belhummer was examined in detail as to every material statement contained in the typewritten statement signed by him, and denied categorically that he had made them. This statement then was read to the jury, over the objection and exception of the defendant. Belhummer was the only witness offered on behalf of the defendant.

The Court, at Page 72, had this to say:

The latitude to be allowed in the examination of a witness in such circumstances is within the discretion of the judge. Here every requirement of the rule was complied with, and there was every reason for permitting cross-examination of the witness. It is the duty of the court to administer justice, rather than to encourage a perversion thereof.

The judgment was affirmed.

In the case of *Owens v. United States*, 61 App. D.C. 132, the Government called as a witness one Aubrey Pillsbury, a brother-in-law of the defendant. Pillsbury in an interview with the district attorney theretofore had made and signed a statement as to his knowledge of the facts concerning which he was to testify. His testimony being inconsistent with his signed statement, the Government claimed surprise and sought and obtained permission to cross-examine the witness. Whereupon counsel for the Government showed the witness the statement, and obtained from him an acknowledgment that the signature was his.

Counsel then examined him as to the contents of the paper in conformity with the rule announced in *Smith v. United States*, 57 App. D.C. 71, 17 F. (2d) 223, where the same question was involved as was raised in this case. The judgment was affirmed.

The Supreme Court of the United States, in *St. Clair v. United States*, 154 U.S. 134, was called upon to consider the question of what latitude should be allowed counsel in the examination of a witness who has taken him by surprise. The Court, in holding that government counsel could show that the testimony of a witness has surprised him and that it was contrary to the examination of such witness preparatory to the trial, or to what the Government had reason to believe the witness would testify, had this to say:

An exception was taken to the mode in which the district attorney was permitted to examine one of the witnesses introduced by the Government. The attorney announced that the answers of the witness had taken him by surprise, and asked that he be permitted to put leading questions to him. This was allowed, and we cannot say that the court in so ruling committed error. In such matters much must be left to the sound discretion of the trial judge who sees the witness, and can, therefore, determine in the interest of truth and justice whether the circumstances justify leading questions to be pro-

pounded to a witness by the party producing him. In *Bastin v. Carew*, Ryan & Mood. 127, Lord Chief Justice Abbott well said that "in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice." The rule is correctly indicated by Greenleaf, when he says: "But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness has recently been brought under the influence of the other party and has deceived the party calling him. For, it is said, that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory allegations are proved by the adverse party." *1 Greenl. Ev. 12th ed. 444; Taylor on Ev. 6th ed. 1262 A.*

The Supreme Court has never reversed itself on this position. In *Hickory v. United States*, 151 U.S. 303, Mr. Chief Justice Fuller made this observation:

When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements

previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness. As to witness of the other party, inconsistent statements, after proper foundation laid by cross-examination, may be shown. *Railway Co. v. Artery*, 137 U.S. 507. But proof of the contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law. Best, Ev. p. 645; Whart. Ev. p. 549; *Melhuish v. Collier*, 15 Q.B. 878.

By statute in England and in many of the States, it has been provided that a party may, in case the witness shall, in the opinion of the judge prove adverse, by leave of the judge, show that he has made at other time statements inconsistent with his present testimony, and this is allowed for the purpose of counteracting actually hostile testimony with which the party has been surprised. *Adams v. Wheeler*, 97 Mass. 67; *Greenough v. Eccles*, 5 C.B. (N.S.) 786; *Rice v. Howard*, 16 Q.B.D. 681.

De Carlo v. United States, 6 F. (2d) 364 (C.C.A. 2nd), is one of the latest expressions by the Federal Courts on this subject. The Government

sought, in that case, to prove by one May Gilmore, that four men sought to intimidate a government witness who was a morphine addict, and who had turned State's evidence to convict one of these men. The Gilmore woman was a companion of the addict on an occasion when the four defendants attacked him on the streets of Buffalo, N.Y. When this witness was produced by the Government, she told the same story concerning the attack as did the addict himself, up to the point of the actual assault, when she declared that she could not identify the defendants. The District Attorney, plainly surprised by this statement, then began to cross-examine her straitly and brought out from her contradictory statements made, not only before the grand jury, but on other occasions. This was objected to and assigned as error in the appellate court. Said the Court, speaking through Circuit Judge Hand, page 368 of the opinion:

The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant is wholly within the discretion of the trial judge. Nothing is more unfair than to confine a party under such circumstances to neutral questions. Not only may the questions extend to cross-examination, but, if necessary to bring out the truth, it is entirely proper to inquire of such a witness whether he has not made contradictory statements at other times. He is present before the jury, and they may gather

the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times. * * * The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

In *Halbert v. United States*, 290 F. 765, (C.C.A. 6th), it was held that where a witness called by the Government made a statement in his testimony differing in a material respect from his earlier sworn statement, the Government had the right to cross-examine him, not for the purpose of introducing his affidavit as substantive proof against accused, but to determine the weight to be given the testimony of that witness.

In *Herran v. State*, 276 S.W. 365 (Sup. Ct. Ark.), the State was held justified in impeaching a witness who, on cross-examination, gave testimony adverse to the State, by making doubtful the defendant's identity as a person who had made a sale of whiskey.

In *State v. Sing*, 229 Pac. 921, the Supreme Court of Oregon approves the familiar rule that,

ordinarily, any witness may be impeached by evidence that he made, at other times, statements inconsistent with his testimony, the statements being first substantially related to him, circumstances of time, places, and persons present.

It is said in Jones' Commentaries on Evidence:

Although the attention of the witness should be called to the time of the alleged statement, exact precision in this regard is not necessary. It suffices if there is reasonable certainty, or if it is clear that the attention of the witness is called to the conversation in such manner that it is identified by him. * * * On the same principle, if the question designates the person or the place with reasonable certainty, it is sufficient * * * The object of these requirements is to give the witness proposed to be impeached, by showing statement out of court contrary to what he has testified at the trial, a fair opportunity to recollect and explain his former statements if he made any. While it is usual and important, whenever practicable, to give the exact terms of the proposed contradictory statement, it is not a fatal objection to the testimony if the variance between the statement as set forth in the question and as given in the answer is not such as to make the two statements substantially different.

Whether or not the prosecutor should be permitted to cross-examine a witness friendly to the defendant, such witness having been produced by

the State, is a question resting within the sound discretion of the trial judge, and it is not erroneous to overrule an objection to the prosecutor's attempting to cross-examine his own witness, when his testimony was asserted to be, and was regarded by the judge, as a surprise to the prosecutor, was the holding in *State v. Genese*, 130 Atl. 642 (C. of Er. & App. of N.J.).

It was held in *Beavers et al. v. United States*, 3 Fed. (2d) 60 (C.C.A. 6th), not to be error to permit the District Attorney to cross-examine a witness called by him to testify in behalf of the Government, in reference to the contents of an affidavit made by the witness at a police station, and which appeared to be in direct conflict with his testimony upon the stand, citing *Sneed et al. v. United States* (C.C.A.), 298 Fed. 911.

The authorities cited by appellant do not conflict with the ruling of the Court in this case.

Counsel in their brief suggest that the witness Herbert Lee had poor eyesight and that his mental faculties were not keen. It is a significant fact, which is borne out by the evidence, that the witness Lee not only identified the defendant Bedell but also identified the defendant Pagliocchini. It is also significant to note that the defendant Pagliocchini, who was identified by Lee at Headquarters and also during the trial, pleaded guilty after all the evidence was in. If the witness Lee was correct in his identification of Pagliocchini, is there anything unusual about his identification of Bedell?

Counsel for appellant in their brief accuse the Police Department and the District Attorney of wanting to convict Bedell for some mysterious reason.

Counsel for appellant know that after the conviction of Bedell, everything that was brought to the attention of the District Attorney's Office and the Police Department was thoroughly investigated. This was done on the representation made by counsel for the appellant.

A short time after the conviction, two men, named Fox and Biekert, were arrested. They had been mentioned on the stand by Grove. They denied having been with Grove, Pagliocchini and Bedell on the night of July 25th. The defendant Pagliocchini, who testified that Bedell was not with him on that night, refused to identify these two men when he faced them on more than one occasion. Counsel for appellant know that the witness Lee failed to identify Fox and Biekert as the two men who had tied him up on the night of July 25th. Counsel were invited to our office to question these men, but they declined to do so. In the face of this counsel allege in their brief that the District Attorney's Office were not interested in making an investigation which would tend to establish the innocence of Bedell.

We have gone out of the record to inform the Court of what transpired after the conviction, and what we have just stated cannot be denied by coun-

sel for the appellant, because of the fact that they were well aware of everything that took place after the conviction of Bedell. For some mysterious reason they are interested in convincing everybody that the identification of Bedell was wrong, and that he is innocent. This is not consistent with the evidence in the case.

It is contended that the court erred in permitting counsel for the Government to cross-examine the defendant Bedell as to different names which he had used in the past, and that the court said it would be proper to ask the witness whether or not he was known as "Jesse James". The record discloses that Mr. Whelan, counsel for appellant, was the first one to suggest the name of Jesse James (R. 46).

The defendant testified that he had pleaded guilty and was fined for violations of the liquor law. How can it be seriously contended that the court erred in permitting counsel to cross-examine the witness as to the different names which he had used?

The trial court may in its discretion limit the scope of cross-examination. *Harris v. U.S.*, 59 App.D.C. 353; 58 W.L.R. 495.

Counsel next find fault with the charge given by the court. The record discloses that when the charge was completed counsel for appellant did not note an exception to any portion of the charge (R. 53).

CONCLUSION

An analysis of the record in this case discloses that a fair trial was accorded this defendant, and it is therefore urged that the judgment in this cause should be affirmed.

Respectfully submitted.

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